CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

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Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

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This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, November 26, 1997.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

MODIFICATION OF CUSTOMS RULING RELATING TO THE COUNTRY OF ORIGIN MARKING REQUIREMENTS FOR IMPORTED DECORATIVE DECALS APPLIED TO IMPORTED CHINAWARE ARTICLES IN THE UNITED STATES

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: Notice of modification of Customs ruling.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling pertaining to the country of origin marking requirements of imported decorative decals applied to finished imported chinaware articles in the United States.

DATE: Merchandise entered or withdrawn from warehouse February 9, 1998.

FOR FURTHER INFORMATION CONTACT: Kristen K. Ver Steeg, Special Classification and Marking Branch, (202) 927–2310.

SUPPLEMENTARY INFORMATION:

BACKGROUND

In Headquarters Ruling Letter (HRL) 734052, dated October 17, 1991 (also published as C.S.D. 93–1, 27 Cust. Bull. 10 (1991)) Customs

considered the country of origin marking requirements applicable to porcelain dinnerware and decals imported into the U.S. for domestic assembly into finished signed, numbered, collectable (non-food use) plates. Customs determined that neither the plates nor the decals were substantially transformed by the domestic application of the decals to the plates, a process known as "decalcomania." Consequently, both articles were required to be marked with their country of origin upon importation into the United States. With regard to the manner of marking, Customs held that the individual plates (or containers) must be marked by a more permanent means than adhesive stickers, so as to survive U.S. processing operations, in order to satisfy the requirements of 19 U.S.C. 1304.

On October 15, 1997, Customs published in the CUSTOMS BULLETIN, Volume 31, Number 42, a notice of a proposal to partially revoke HRL 734052, *supra*, indicating that imported 'ceramic colors image" decals are substantially transformed by decalcomania. One comment was received in response to this notice.

The commenter is of the opinion that the imported chinaware articles are exempt from individual marking prior to the decalcomania process pursuant to 19 CFR 134.32(c), which exempts articles that cannot be marked prior to shipment except at an expense economically prohibitive of its importation, or 19 CFR 134.32(g), which exempts articles to be processed by the importer or for his account otherwise than for the purpose of concealing the origin of imported articles and in such a manner that any such origin marking would necessarily be obliterated, destroyed or permanently concealed. Instead, the commenter believes that the articles should be marked after importation into the U.S. "at a time both logically appropriate and economically sensible in the manufacturing process, before the finished item reaches the 'ultimate purchaser'." However, the commenter does not contest marking the articles individually after the decalcomania process, prior to their reaching the "ultimate purchaser."

Under the circumstances of this case, we find the exceptions under 19 CFR 134.32(c) and (g) to be inapplicable and unnecessary. Section 134.32(d) of the Customs Regulations (19 CFR 134.32(d)) exempts from the marking requirements those articles for which the marking of the container will reasonably indicate the origin of the articles. Inasmuch as the imported chinaware articles are not substantially transformed in the U.S., the domestic processor is not the "ultimate purchaser" but a repackager of articles processed subsequent to importation. If the articles are imported in marked containers, but will be repackaged *(i.e.*, removed from their marked containers prior to reaching the ultimate purchaser), the importer must execute a remarking/repacking certification pursuant to 19 CFR 134.26 at the time of importation. Therefore. provided the plates are imported in marked containers and the importer executes the 19 CFR 134.26 certification, the plates will be ex-

cepted from individual marking at the time of importation pursuant to 19 CFR 134.32(d).

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying HRL 734052, *supra*, to indicate that decorative "ceramic colors image" decals are substantially transformed into a new and different article as a result of decalcomania, the process by which the decals become permanently adhered to finished, but undecorated articles of chinaware. Accordingly, the finished decorated chinaware articles need not be marked with the country of origin of the imported "ceramic colors image" decals. Headquarters Ruling Letter 560223, modifying HRL 734052, *supra*, is set forth in the attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change in practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: November 25, 1997.

SANDRA L. BELL,
(for John Durant Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, November 25, 1997.
MAR–05 RR:TC:SM 560223 KKV
Category: Marking

MR. DAN GLUCK
SERKO & SIMON LLP
One World Trade Center
Suite 3371
New York, NY 10048

Re: Country of origin of imported "ceramic colors image" decals, bone china; substantial transformation; decalcomania; organic materials burned away during domestic processing; modification of HRL 734052; C.S.D. 93–1; imported chinaware exempt from marking where certification executed; 19 CFR 134.32(d); 19 CFR 134.26.

DEAR MR. GLUCK:

This is in response to your letters dated December 2, 1996, and November 14, 1997, on behalf on Waterford Wedgwood USA, Inc. ("Wedgwood"), which requests a binding ruling regarding the country of origin of certain articles of china imported into the United States from England for further processing. Samples of a decal and a china plate at two stages of the production process have been submitted for our examination.

Facts:

We are informed that Wedgwood intends to import into the U.S. glazed, bone china tableware, accessories and giftware of English origin. Wedgwood also intends to import decals of

various designs of Japanese, English and other sources of foreign origin into the United States. In the United States, Wedgwood will transfer the designs to the glazed, bone china via application of the decals and kiln firing, a process referred to as "decalcomania." In addition to the decal of the design pattern, Wedgwood intends to simultaneously apply a decal of the backstamp, which will indicate the country of origin of the finished plate, in addition to other information.

With regard to the sample plate submitted for our examination, we are informed that, as a part of the processing performed in the U.S., the decal is removed from the paper backing and placed onto a glazed, but undecorated plate. Additionally, the plate is placed into a kiln and baked, during which:

1. the thousands of granules that make up the design will undergo a metamorphosis by melting and coagulating into one mass;
2. the melted and coagulated paint will adhere to the article of china;
3. the adhesive will melt;
4. the clear plastic film will burn away; and
5. a gold band will be applied to the rim, and the plate will be refired.

The Customs Service Office of Laboratories and Scientific Services was consulted with regard to the request for a binding ruling. In a report issued by that office, we are informed that the type of decal in question, a "ceramic colors image" which is suitable for the decoration of pottery and porcelain only, consists of a paper backing, an organic temporary adhesive or water-soluble adhering agent, plastic film, inorganic pigments in a given design and, in some cases, an inorganic adhesive (usually silicate).

To prepare the decal for firing, the decal is dampened, placed on the pottery or porcelain material (such as a plate) and dried. The paper backing is removed. Although the backing has been removed, the presence of a temporary adhesive or water-soluble adhering agent keeps the image affixed to the plate until heat is applied. Once the plate has reached a given temperature in the kiln, the organic materials (adhering agent, plastic film and carrier resins (if present)) are burned away. The plate is then raised to a higher "service" temperature, at which point the pigments will partially vitrify. Under partial vitrification, the pigment does not completely melt but the particles become soft and stick together without totally losing their shape. There is no chemical change in the pigment, but the applied heat results in a change in the crystallinity of the pigmentatious materials. Having undergone partial vitrification in the firing process, the design is transferred to the plate, where it has permanently fused with the porcelain or pottery surface.

You inquire whether the decals themselves or the finished articles must be marked with the country of origin of the imported decals and whether the finished china articles may be marked, "Fine English China" or "Made in England" or similar wording. In your comment on Customs proposed modification of Headquarters Ruling Letter (HRL) 734052, dated October 17, 1991, you state that Wedgwood wishes to import the china with the country of origin affixed to the containers but not to the china itself. As part of the subsequent decalcomania process in the U.S., a backstamp decal will be applied individually to the chinaware articles which will indicate the country of origin.

Issue:

Whether imported "ceramic colors image" decals are substantially transformed when applied to porcelain or ceramic articles for purposes of the country of origin marking requirements of 19 U.S.C. 1304 and 19 CFR Part 134.

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the United State the English name of the country of origin of the article. By enacting 19 U.S.C. 1304, Congress intended to ensure that the ultimate purchaser would be able to know by inspecting the marking on the imported goods the country of which the goods are the product. The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will. *United States v. Friedlaender & Co.*, 27 C.C.P.A. 297, 302 C.A.D. 104 (1940).

Section 134.1(b), Customs Regulations (19 CFR 134.1(b)), defines "country of origin" as:

> The country of manufacture, production, or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the "country of origin" within the meaning of this part; however for a good of a NAFTA country, the NAFTA Marking Rules will determine the country of origin.

It is a well established policy, and it is not disputed here, that the decoration of imported ceramic or china articles by means of painting or decalcomania does not substantially transform these imported articles (*See* Treasury Decision (T.D.) 89–21, 23 Cust.Bull. 157 (1989); *See also* HRL 707057, dated December 10, 1976; HRL 058996, dated June 21, 1979; HRL 724978, dated July 13, 1984 (also published as Customs Service Decision (C.S.D.) 84–113, 18 Cust.Bull. 1111 (1984); HRL 732964, dated August 3, 1990); HRL 735595, dated August 2, 1994 and HRL 558734, dated November 4, 1994).

While agreeing that the plate is not substantially transformed by means of decoration, you assert that the imported decal is substantially transformed as a result of becoming affixed to the china plate. Customs has previously discussed the substantial transformation of decals. In HRL 734052, dated October 17, 1991 (also published as C.S.D. 93–1, 27 Cust. Bull. 10 (1991)), Customs considered porcelain dinnerware and decals imported into the U.S. for domestic assembly into finished signed, numbered collectable (non-food use) plates. Customs determined that neither the plates nor the decals were substantially transformed by the domestic application of the decals to the plates, as the decalcomania process left the identity of both the plates and decals intact. Upon review, however, we note that while the issue of substantial transformation was discussed in great detail with regard to the imported plates, the imported decals were not addressed with particularity. Therefore, we revisit this issue here.

The well-established test for determining whether a substantial transformation has occurred is derived from language enunciated by the court in *Anheuser-Busch Brewing Association v. United States*, 207 U.S. 556, 562 (1908), which defined the term "manufacture" as follows:

> Manufacture implies a change, but every change is not manufacture and yet every change in an article is the result of treatment, labor and manipulation. But something more is necessary, as set forth and illustrated in *Hartranft v. Wiegmann*, 121 U.S. 609. There must be transformation; a new and different article must emerge, having a distinctive name, character or use.

Simply stated, a substantial transformation occurs "when an article emerges from a process with a new name, character, or use different from that possessed by the article prior to processing." See *Texas Instruments, Inc. v. United States*, 69 CCPA 152, 681 F.2d 778 (1982) (cited with approval in *Torrington Co. v. United States*, 764 F. 2d 1563, 1568 (1985)).

In C.S.D. 93–1, *supra*, Customs determined that no substantial transformation of the decals had taken place because "the decalcomania process left the identity of both the plates and decals intact." However, in the matter before us, while the pigment design of the "ceramic colors image" is, indeed, transferred intact, the "decal" itself undergoes significant changes as a result of domestic processing. The article at issue, a "ceramic colors image" decal, is, by its very nature, a temporary article which serves as an instrumentality of transference of ceramic colors. In the vitrification process, organic agents present in the original decal (temporary adhesive or water-soluble adhering agent plastic film and carrier resins) are burned away and the transferred pigment undergoes a change in crystallinity. Once partially vitrified, it permanently fuses to the surface of the chinaware. It is no longer a "decal" but is a permanent part of the plate (or other chinaware article). Inasmuch as the organic agents present in the original decal are no longer present to assist in a second transfer, what remains is not a "decal" but the pigment image whose revitrification (if possible) would ruin both the pigment design and the plate or other china article upon which it rests. Consequently, as a result of processing, the original decal has undergone a change in name, character and use—prerequisites for a finding of a substantial transformation. Therefore, the U.S. processor is the "ultimate purchaser" of the imported decals. *See* 19 CFR 134.1(d) and 134.35. Accordingly, neither the porcelain articles nor the decals themselves must be marked with the country of origin of the decals. However, the outermost containers in which the decals are imported must be marked with the country of origin of the decals.

In regard to your request that Wedgewood be permitted to import the chinaware articles with the country of origin marked on the containers rather than on the chinaware itself, section 134.32(d), Customs Regulations (19 CFR 134.32(d)), exempts from the marking requirements those articles for which the container will reasonably indicate the origin of the articles. Therefore, provided the china is imported in properly marked containers, the certification set forth in section 134.26, Customs Regulations (19 CFR 134.26), is executed, the plates are not required to be individually marked at the time of importatiohn. After processing in the U.S., however, the china must be individually marked prior to reaching the ultimate purchaser. With regard to the marking of porcelain plates, Customs has held that the plates must be individually marked with a more permanent means than adhesive stickers in order to satisfy the country of origin marking requirements of 19 U.S.C. 1304. *See* HRL 734052, *supra*, and C.S.D. 84–113, *supra*. The proposed markings, "Fine English China" or "Made in England" or similar words meet the requirements of 19 U.S.C. 1304 and 19 CFR Part 134.

Holding:

Based upon the described facts, the application of a "ceramic colors image" decal to finished porcelain articles results in a substantial transformation of the imported decals and the U.S. processor is the ultimate purchaser of the imported decals. Thus, neither the finished porcelain articles nor the decals themselves must be marked with the country of origin of the decals. Accordingly, the holding in HRL 734052, dated October 17, 1991, also published as C.S.D. 93–1, 27 Cust. Bull 10 (1991) is hereby modified as it pertains to imported decals. The imported chinaware articles are excepted from individual marking at the time of importation pursuant to 19 CFR 134.32(d), provided they are imported in properly marked containers and the 19 CFR 134.26 repacking certification is executed. After processing in the U.S., however, the chinaware articles must be individually marked with their own country of origin legibly, indelibly, and by a more permanent means than adhesive stickers. In addition, the outermost containers in which the decals are imported must be marked with their country of origin.

A copy of this ruling letter should be attached to the entry documents filed at the time the goods are entered. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

SANDRA L. BELL,
(for John Durant, Director,
Commercial Rulings Division.)

PROPOSED REVOCATION OF RULING LETTER PERTAINING TO THE CLASSIFICATION OF MINERAL LABORATORY TEST BAGS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of mineral laboratory test bags.

DATE: Comments must be received on or before January 9, 1998.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to and may be inspected at the U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Rebecca A. Hollaway, Commercial Rulings Division (202) 927–2379.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke Port Decision (PD) 818482, issued by the Port Director of Customs, Portland, Maine, on October 10, 1996, pertaining to the tariff classification of mineral laboratory test bags.

In PD 818482, Customs incorrectly classified mineral laboratory test bags under heading 6307 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), as other made up textile articles. PD 818482 is set forth as "Attachment A" to this document. The mineral laboratory test bags are correctly classified as sacks and bags of a kind used for the packing of goods under heading 6305, HTSUSA. Before taking this action, we will give consideration to any written comments timely received. Proposed HQ 961058 revoking PD 818482 is set forth as "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: November 25, 1997.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Portland, ME, January 29, 1996.
CLA–2–63:P:CO:G23 818482
Category: Classification
Tariff No. 6307.90.9989

MS AGNES TAM
MEE SUM TRADING CO.
Block A/15F, Cheung Lee Ind. Bldg.
9 Cheung Lee Street
Chaiwan, Hong Kong

Re: The tariff classification of mineral lab test bags from China.

DEAR MS TAM:

In a letter dated January 12, 1996, you requested a tariff classification ruling on mineral lab test bags to be imported from China.

You submitted the following four (4) samples: (1) a polypropylene spunbond non-woven bag, approximately 48 cm by 37.5 cm in dimension, with drawstring at top for closure; (2) a polyester spunbond non-woven bag, approximately 60 cm by 31 cm, with drawstring at top and an identification tag at the side for record use; (3) a polyester spunbond non-woven bag, approximately 33 cm by 18 cm, with drawstring and record tag; and (4) a woven cotton bag, approximately 31 cm by 17.5 cm, also with drawstring closure and record tag. You state that these items are intended for industrial use in holding minerals sent for lab testing.

The applicable subheading for the mineral lab test bags will be 6307.90.9989, Harmonized Tariff Schedule of the United States (HTS), which provides for other made up articles * * * Other: Other, Other. The rate of duty will be 7 percent *ad valorem*.

No textile category is currently assigned to articles classifiable under 6307.90.9989, HTSUSA.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

EMERY W. INGALLS,
Service Port Director.

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC.
CLA–2 RR:CR:TE 961058 RH
Category: Classification
Tariff No. 6305.20.0000, 6305.33.0020, 6305.33.0010, and 6305.39.0000

MS. AGNES TAM
MEE SUM TRADING COMPANY
Block A, 15/F
Cheung Lee Ind. Bldg.
9 Cheung Lee Street
Chaiwan, Hong Kong

Re: Revocation of PD 818482; classification of mineral laboratory test bags; heading 6305; heading 6307; other made up articles; sacks and bags.

DEAR MS. TAM:

On October 10, 1996, the Port Director of Customs, Portland, Maine, issued Port Decision (PD) 818482, addressed to you on behalf of Mee Sum Trading Limited, concerning the

classification of mineral laboratory test bags. In that decision, Customs classified the bags under subheading 6307.90.9989 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), as other made up textile articles.

We reviewed PD 818482 and have determined that the classification set forth in that decision was in error. This letter revokes PD 818482 and sets forth the correct classification of the mineral laboratory bags.

Facts:

In PD 818482, four submitted samples of mineral laboratory bags were described as follows:

> (1) a polypropylene spunbond non-woven bag, approximately 48 cm by 37.5 cm in dimension, with drawstring at top for closure; (2) a polyester spunbond non-woven bag, approximately 60 cm by 31 cm, with drawstring at top and an identification tag at the side for record use; (3) a polyester spunbond non-woven bag, approximately 33 cm by 18 cm, with drawstring and record tag; and (4) a woven cotton bag, approximately 31 cm by 17.5 cm, also with drawstring closure and record tag. You state that these items are intended for industrial use in holding minerals sent for laboratory testing.

Issue:

Whether the mineral laboratory bags are classifiable under heading 6307, HTSUSA, as other made up articles, or under subheading 6305, HTSUSA, as sacks and bags of a kind used for the packing of goods?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRIs). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Customs initially classified the mineral laboratory bags under heading 6307, a residual provision that provides for other made up textile articles not specifically provided for elsewhere in the tariff.

Heading 6305, HTSUSA, provides for sacks and bags, of a kind used for the packing of goods. The Explanatory Notes to the Harmonized Commodity Description and Coding System (EN), although not legally binding, are the official interpretation of the tariff at the international level.

The EN to heading 6305 state in pertinent part:

> This heading covers textile sacks and bags of a kind normally used for the packing of goods for transport, storage or sale.
>
> These articles, which vary in size and shape, include in particular flexible intermediate bulk containers, coal, grain, flour, potato, coffee or similar sacks, mail bags, and small bags of the kind used for sending samples of merchandise by post. The heading also includes such articles as tea sachets.

In Headquarters Ruling Letter (HQ) 958078 dated December 12, 1995, we held that bags used to transport experimental seeds from experimental plots to research facilities and which were discarded after the seeds were evaluated were properly classifiable under heading 6305. Like the bags in HQ 958078, the mineral laboratory bags in question are used to collect and transport samples to a research facility for analysis. The use of the mineral bags falls within the function described in the EN to heading 6305 for sacks and bags—for the packing of goods for transport, storage or sale. Moreover, in our opinion minerals constitute "goods" for the purposes of heading 6305. Accordingly, the mineral laboratory bags are classifiable under that heading.

Holding:

The mineral laboratory bags made of cotton woven fabrics are classifiable under subheading 6305.20.0000, HTSUSA. They are dutiable at the general column rate of duty at 6.8 percent *ad valorem* and the textile category number is 369. The mineral laboratory bags constructed of polypropylene spunbonded nonwoven fabrics and the polyester bags are classifiable under subheading 6305.39.0000, HTSUSA. The bags made of polypropylene woven strips are classifiable under subheading 6305.33.0010, HTSUSA, or subheading 6305.33.0020, HTSUSA. The polyester and polypropylene bags are dutiable at the general column rate of duty at 9.2 percent *ad valorem* and the textile category number is 669.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF LEATHER PIECES CUT-TO-FIT AN AUTOMOTIVE GEAR SHIFT LEVER KNOB

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)] as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L.. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the classification of leather pieces cut-to-fit the knob of an automotive gear shift lever. Comments are invited on the correctness of this proposal.

DATE: Comments must be received on or before January 9, 1998.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations & Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, NW, Washington, DC 20229. Comments submitted may be inspected at the same location.

FOR FURTHER INFORMATION CONTACT: Richard Romero, Attorney-Advisor, Commercial Rulings Division at 202–927–2388.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 [19 U.S.C. 1625(c)(1)] as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L.. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the classification of leather pieces cut-to-fit an automotive gear shift lever knob.

In NY A89017, dated November 12, 1996, (set forth as Attachment A hereto) the Area Director of Customs, New York, determined that leather pieces cut-to-fit the knob of a gear shift lever were classifiable under subheading 8708.99.67, Harmonized Tariff Schedule of the United States (HTSUS), which provides for parts and accessories of the motor vehicles of headings 8701 to 8705; other parts and accessories; other; other other; other parts for power trains. However, subsequent information has come to our attention which indicates that the primary purpose of the leather pieces is decorative, not functional. Since the leather pieces in no way enhance the performance of the power train, and are interchangeable and non-essential, Customs is now of the opinion that they are in the nature of accessories and are classifiable under subheading 8708.99.80, HTSUS, which provides for parts and accessories of the motor vehicles of headings 8701 to 8705: other parts and accessories; other; other; other.

Customs intends to revoke NY A89017 to reflect the proper classification of the leather pieces under subheading 8708.99.80, HTSUS. Before

taking this action consideration will be given to any written comments timely received. Proposed HQ 960950, revoking NY A89017, is set forth as Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9) will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: November 25, 1997.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, November 12, 1996.

CLA–2–87:RR:NC:1:101 A89017
Category: Classification
Tariff No. 8708.99.6700

MS. KATHRYN BLANTON
NIPPON EXPRESS U.S.A., INC.
135 Interstate Blvd.
Building 2, Suite 5
Greenville, SC 29615

Re: The tariff classification of leather pieces cut-to-shape for an automotive gearshift lever knob from Germany.

DEAR MS. BLANTON:

In your letter dated October 18, 1996 you requested a tiff classification ruling on behalf of DAA-Draexlmaier Automotive of America (Importer #57–103218100) of Duncan, South Carolina.

The items concerned are two pieces of soft, black leather (shown below); one is crown-shaped and measures 4″L × 5 3/10″W, the other is shaped like an exclamation point and measures 4 3/8″L × 1 3/8″W.

You state that the actual manufacturer of these leather pieces is not known to you, but that they will be shipped to the U.S. by Firmengruppe Draxlmaier of Vilsbiburg, Germany.

The applicable subheading for the two leather pieces cut-to-shape for an automotive gearshift lever knob will be 8708.99.6700, Harmonized Tariff Schedule of the United States (HTS), which provides for Parts and accessories of * * * motor vehicles * * *: Other: Other: Other: Other parts for power trains. The rate of duty will be 2.9% *ad valorem*.

Samples of the other cut-to-shape leather pieces which you mention in your Ruling Request (for automotive air bags, door panels, etc.) will need to be provided if you choose to submit Ruling Requests for them in the future.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Robert DeSoucey at 212–466–5667.

ROGER J. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 960950 RTR
Category: Classification
Tariff No. 8708.99.80

MR. DONNIE B. TURBEVILLE,
CUSTOMS COORDINATOR
BMW
1400 Highway 101 South
Greer, SC 29651

Re: NY A89017 revoked; leather cut-to-fit pieces for automotive gear shift lever knob; parts, accessories, heading 4205.00, HTSUS.

DEAR MR. TURBEVILLE:

This is in reference to your letter of July 16, 1997, requesting reconsideration of NY A89017, concerning the classification of cut-to-shape leather pieces that are used for gear shift lever knobs.

In NY A89017, issued to Nippon Express, U.S.A., Inc., on November 12, 1996 on behalf of DAA-Draexlmaier Automotive of America, the Area Director of Customs, New York determined that two pieces of cut-to-shape leather, which, when sewn together, fit a gear shift lever, were classifiable under subheading 8708.99.67, Harmonized Tariff Schedule of the United States (HTSUS), which provides for parts and accessories of the motor vehicles of headings 8701 to 8705; other parts and accessories; other; other; other parts for power trains. You contend that such leather pieces are also used for door panels, air bag coverings, etc., and are classifiable in heading 4205, HTSUS, which provides for other articles of leather, or of composition leather.

Facts:

The articles subject to NY A89017 consist of two pieces of soft, black leather; one is crown-shaped, measuring 4 inches L x 5–3/10 inches W; the other is shaped like an exclamation point and measures 4–3/8 inches L x 1–3/8 inches W. Both are cut-to-shape to fit the knob of the gear shift lever of BMW automobiles. They are sewn around the gear shift lever after importation.

There are at least three types of gear shift lever knobs available on BMW automobiles: leather, polished teak, and rubber. Although there is an aesthetic difference between them and individual BMW customers might choose one above another on this basis, none enhances the performance of, nor is an essential constituent or component of the power train. Thus, when sewn around the gear shift lever, the effect of the leather pieces is aesthetic, not functional.

Issue:

Whether the leather pieces are classifiable under heading 4205, HTSUS, as "other articles of leather or of leather composition", or as "other parts of power trains" under heading 8708, HTSUS, or as "other parts and accessories" under heading 8708, HTSUS.

Law and Analysis:

Merchandise is classifiable under the HTSUS in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The Harmonized Commodity Description And Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the ENs should always be consulted. See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

The tariff provisions under consideration are as follows:

4205.00		Other articles of leather or of composition leather:
		Other
4205.00.80		Other
*	* * * * * * *	
8708		Parts and accessories of the motor vehicles of headings 8701 to 8705
		Other parts and accessories
8708.99		Other
		Other
8708.99.67		Other parts for power trains
8708.99.80		Other

You suggest that the merchandise is classifiable in subheading 4205.00.80, HTSUS, which provides for articles of leather or of composition leather: other: other. This is a basket provision covering leather goods not enumerated elsewhere in the HTSUS. Customs believes that the merchandise is properly classifiable in subheading 8708.99.80, HTSUS, which specifically covers parts and accessories for motor vehicles. This, too, is a basket provision, but it is preferable to subheading 4205.00.80 for the reasons stated below.

Although the merchandise is not specifically described in chapters 4205 or 8708, HTSUS, or in the ENs, EN 87.08 (at pages 1552, 1553) provides a two-part test for "parts" and "accessories," which brings the leather pieces squarely into the purview of heading 8708, HTSUS. According to EN 87.08, this heading covers parts and accessories of motor vehicles of headings 87.01 to 87.05, provided the parts and accessories fulfill both of the following conditions: (i) they must be identifiable for use solely or principally with the above-mentioned vehicles; and (ii) they must not be excluded by the provisions to the Notes to Section XVII. * * * Further, parts and accessories of this heading include: * * * (M) Control equipment, for example, steering wheels, steering columns, and steering boxes, steering axles; ***gear change*** * * * ***levers*** (emphasis added)* * *

Webster's II New Riverside University Dictionary defines a "part" as a "component capable of being separated from the system"; a "component" is defined as a "constituent, as an element of a system"; a "constituent" is defined as that which is "*necessary* in the formation of the whole" (emphasis added). Under these definitions, in order to be a "part", an item must be necessary to the formation of the power train. The leather pieces are not necessary because both rubber and teak covered gear shift lever knobs can be substituted for the leather pieces with no diminution in performance. Thus, they are not "parts".

The term "accessory" is not defined in either the HTSUS or the ENs. An accessory is generally an article which is not necessary to enable the goods, with which it is used, to fulfill their intended function. Accessories are of secondary importance, not essential in and of themselves. They must, however, somehow contribute to the effectiveness of the principal article (e.g., facilitate the use or handling of the principal article, widen the ranges of its uses, or improve its operation). An accessory must be identifiable as being intended solely or principally for use with a specific article.

Customs believes that the power train of a motor vehicle extends from the engine through the transmission and differential through the power axles. The gear shift lever knob, which includes the sewn-on leather pieces, is a component of the power train. However, since both teak and rubber lever covers can be substituted without diminution in power train performance, the merchandise is not essential to the operation of the automobile. While they are of secondary importance, the leather pieces contribute to the effectiveness of the principal article (the power train) because they protect the driver's hand from shock and vibration. Owing to the fact that they are cut-to-fit, the leather pieces can only be used for the gear shift levers of automobiles. Likewise, cut-to-fit leather pieces for door panels, air bag coverings, etc., can only be used for automobiles.

The leather pieces satisfy the first requirement of the two-part test of EN 87.08 because, as stated above, they are suitable for use solely or principally with BMW automobiles. They satisfy the second requirement because there is no exclusion which covers the subject merchandise in the Notes to Sections XIII or XVII, HTSUS, or in the Notes to chapters 42 or 87, HTSUS. Thus, for tariff purposes, the leather pieces are accessories under heading 8708, HTSUS.

Under Additional U.S. Rule of Interpretation 1(c), HTSUS, a provision for parts of an article covers products solely or principally used as a part of such articles, but a provision for "parts" or "parts and accessories" shall not prevail over a specific provision for such

part or accessory. Thus, only a specific provision for a part will prevail over a "parts and accessories" provision. It is an accepted rule of classification that a basket provision is not specific for tariff purposes. Subheading 4205.00.80, HTSUS, is not a specific provision because it is a basket provision. For this reason, it does not prevail over subheading 8708.99.80, HTSUS.

Holding:

Under the authority of GRI 1 and Additional U.S. Rule of Interpretation 1(c), HTSUS, the cut-to-fit leather pieces are provided for in heading 8708, HTSUS. They are classifiable in subheading 8708.99.80, HTSUS, as other parts and accessories of the motor vehicles of headings 8701 to 8705. The applicable duty rate is 2.7% *ad valorem*.

JOHN DURANT,
Director,
Commercial Rulings Division.

REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF "FANTASTIC SAND SURPRISES DESIGN MAKING SET"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of "Fantastic Sand Surprises Design Making Set." The "Fantastic Sand Surprises Design Making Set" is a craft kit used by a child to create sand designs and make a sand design necklace.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after February 9, 1998.

FOR FURTHER INFORMATION CONTACT: Robert Cascardo, General Classification Branch (202) 927–2402.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On October 22, 1997, Customs published in the CUSTOMS BULLETIN, Volume 31, Number 43, a notice of a proposal to revoke New York Ruling Letter (NYRL) 805760, dated February 1, 1995, which held that the "Fantastic Sand Surprises Design Making Set" was classifiable as a set in subheading 6815.99.4000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), the provision for other articles of stone or of other mineral substances (including articles of peat), not elsewhere specified or included. No comments were received in response to the notice.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking NYRL 805760 to reflect the proper classification of "Fantastic Sand Surprises Design Making Set" as a set in subheading 9503.70.0000, HTSUSA, the provision for "Other toys, put up in sets or outfits, and parts and accessories thereof, Other: Other." The applicable rate of duty is free. Headquarters Ruling Letter 959254 revoking NYRL 805760 is set forth in the attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change in practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: November 25, 1997.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC, November 25, 1997.

CLA–2 RR:CR:GC 959254 RC
Category: Classification
Tariff No. 9503.70.0000

TIMOTHY F. BUNTEL
HASBRO, INC.
1027 Newport Ave.
P.O. Box 1059
Pawtucket, RI 02862–1059

Re: Revocation of New York Ruling Letter (NYRL) 805760; regarding classification of "Fantastic Sand Surprises Design Making Set"; Headquarters Ruling Letter (HQ) 958267

DEAR MR. BUNTEL:

This is in reference to NYRL 805760, issued to you, on February 1, 1995, on behalf of Hasbro, Inc., classifying a craft kit in subheading 6815.99.4000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), the provision for other articles of stone or of other mineral substances (including articles of peat), not elsewhere specified or included, dutiable at the rate of 3.6 percent *ad valorem*. We have reviewed NYRL 805760 and determined that it no longer reflects the views of the U.S. Customs Service. The following represents our position and revokes that ruling.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of NYRL 884433 was published on October 22, 1997, in the CUSTOMS BULLETIN, Volume 31, Number 43. No comments were received in response to the notice. The following represents our position.

Facts:

The "Fantastic Sand Surprises Design Making Set" (Item No. 8538.00) consists of a battery-operated plastic spinner with a removable plastic lid, four 3.17 oz. bottles of sand, thirteen plastic design shapes, two plastic display stands, rubber pads and stickers/label sheet, instructions and a cord. The kit is used by a child to create sand designs and make a sand design necklace.

Issue:

Whether the "Fantastic Sand Surprises Design Making Set" is properly classified as a toy in subheading 9503.70.0000, HTSUS, or in subheading 6815.99.4000, HTSUS.

Law and Analysis:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI's). The systematic detail of the HTSUSA is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI's may then be applied. The Explanatory Notes (ENs) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI's. *See*, T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

The EN's to heading 9503 (page 1712) state that "Collections of articles, the individual items of which if presented separately would be classified in other headings in the Nomenclature, are classified in this Chapter when they are put up in a form clearly indicating their use as toys (*e.g.*, instructional toys such as chemistry, sewing, *etc.*, sets)." The instant set is clearly designed for children. Although the articles, which the child creates, may be used as jewelry or as decorative items for the home, we believe that the utility of the finished products is secondary to the play value of creating the products.

In HQ 958267, dated May 21, 1996, issued to Hasbro, Inc., Customs classified "Fantastic Crystal Creations," a product similar to "Fantastic Sand Surprises Design Making Set," in subheading 9503.70.0000, HTSUS, the provision for "Other toys, put up in sets or outfits, and parts and accessories thereof, Other: Other." Customs held that the individual components of the "Fantastic Crystal Creations" were put up in a manner that would indicate their use as a toy and stated that generally, such craft kits have been considered "educational toys" classifiable under Chapter 95.

As such, we find that NYRL 805760 is incorrect. The "Fantastic Sand Surprises Design Making Set" is more specifically provided for in subheading 9503.70.0000, HTSUSA, rather than in subheading 6815.99.4000, HTSUSA.

Holding:

The product identified as, "Fantastic Sand Surprises Design Making Set," is properly classifiable within subheading 9503.70.0000, HTSUSA, which provides for "Other toys, put up in sets or outfits, and parts and accessories thereof, Other: Other." This provision is duty free under the general column one rate.

NYRL 805760 is revoked.

In accordance with 19 U.S.C. 1625, this ruling will become effective 60 days from its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1).

MARVIN AMERICK,
(for John Durant, Director,
Commercial Rulings Division.)

REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF ALUMINUM SILICON MASTER ALLOY

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of a tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of aluminum silicon master alloy. The aluminum silicon master alloy consists of less than 50 percent aluminum, more than 50 percent silicon, and the balance of iron and other elements.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after February 9, 1998.

FOR FURTHER INFORMATION CONTACT: Robert Cascardo, General Classification Branch, Office of Regulations and Rulings (202) 927–2402.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On October 22, 1997, Customs published in the CUSTOMS BULLETIN, Volume 31, Number 43, a notice of a proposal to revoke New York Ruling Letter (NYRL) 884433, dated May 4, 1993, which held that aluminum silicon was classifiable in heading 2850, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), the provision for other silicides. No comments were received in response to the notice.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking NYRL 884433 to reflect the proper classification of the subject aluminum silicon master alloy in heading 3824, HTSUSA, the provision for prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included; residual products of the chemical or allied industries, not elsewhere specified or included. Headquarters Ruling Letter 960436, revoking NYRL 884433, is set forth in the attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change in practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: November 25, 1997.

MARVIN AMERICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, November 25, 1997.

CLA-2 RR:CR:GC 960436 RC
Category: Classification
Tariff No. 3824.90.9050

MR. MARK S. WALKER
VICE PRESIDENT—FERROALLOYS
AMERICAN CARBON METALS CORPORATION
100 Hightower Boulevard
Pittsburgh, PA 15205-1134

Re: Revocation of New York Ruling Letter (NYRL) 884433; aluminum silicon master alloy.

DEAR MR. WALKER:

We have been asked to reconsider NYRL 884433, issued to you on May 4, 1993, on behalf of your company. The ruling concerns the classification of aluminum silicon master alloy, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). After further review of NYRL 884433, Customs Headquarters is of the opinion that it is in error and should be revoked. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of NYRL 884433 was published on October 22, 1997, in the CUSTOMS BULLETIN, Volume 31, Number 43. No comments were received in response to the notice. The following represents our position.

Facts:

In NYRL 884433, dated May 4, 1993, Customs classified an aluminum silicon master alloy consisting of less than 50 percent aluminum, more than 50 percent silicon, and the balance of iron and other elements in subheading 2850.00.5000, HTSUSA, dutiable in 1993 at 3.7 percent *ad valorem*, as products of China.

Issue:

Whether the instant aluminum silicon master alloy product is classifiable in subheading 2850.00.5000, HTSUSA, or in subheading 3824.90.9050, HTSUSA.

Law and Analysis:

The General Rules of Interpretation (GRIs) taken in their appropriate order provide a framework for classification of merchandise under the HTSUS. Most imported goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative section or chapter notes. The Explanatory Notes (ENs) to the Harmonized Commodity Description and Coding System, which represent the official

interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and GRIs.

Heading 2850, HTSUS, provides for hydrides, azides, silicides and borides, whether or not chemically defined, other than the compounds which are also carbides of heading 2849. Heading 3824, HTSUS, provides for prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products) not elsewhere specified or included.

Customs issued NYRL 884433 based on information supplied by American Carbon Metals Corporation indicating that the subject aluminum silicon master alloy consisted of less than 50 percent aluminum, more than 50 percent silicon, and up to 5 percent iron and other elements. The U.S. Customs Laboratory analysis described the sample as gray-black lustrous coarse grains consisting of 80 percent silicon, 18 percent aluminum, and one percent iron by weight. The aluminum silicon master alloy was classified in subheading 2850.00.0050, HTSUS, as predominantly silicon admixed or fused with other metals.

Further study of scientific literature reveals that aluminum is one of the metals that does not form a silicide with silicon. *See*, *Kirk-Othmer*, 3rd Edition, Vol 20, pp. 486–7. Given, that the subject master alloy of NYRL 884433 is not a hydride, azide, **silicide** or boride of heading 2850, HTSUS, it is not classifiable therein. Instead, the subject aluminum silicon master alloy is a mixture of silicon, aluminum, iron and traces of other elements. Consequently, it is our opinion that the aluminum silicon master alloy is properly classified in heading 3824, HTSUS, the provision for "[p]repared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products) not elsewhere specified or included."

Holding:

The subject aluminum silicon master alloy falls into subheading 3824.90.9050, HTSUS, the provision for "[p]repared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products) not elsewhere specified or included; residual products of the chemical or allied industries, not elsewhere specified or included: Other: Other: Other: Other: Other * * * Other," dutiable, as a product of China, at the general column one rate of 5 percent *ad valorem*.

NYRL 884433 is revoked.

In accordance with 19 U.S.C. 1625, this ruling will become effective 60 days from its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1).

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

PROPOSED REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF TRASYLOL® (APROTININ) AND TRASYLOL® VLE (APROTININ INJECTION)

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke one ruling pertaining to the tariff classification of Trasylol® VLE and Trasylol® (aprotinin injection). Customs invites comments on the correctness of the proposed revocation.

DATE: Comments must be received on or before January 9, 1998.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229. Comments submitted may be inspected at the same location.

FOR FURTHER INFORMATION CONTACT: Edward A. Bohannon, Senior Attorney, Commercial Rulings Division, (202)927–1613.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of Trasylol® (aprotinin) and Trasylol® VLE (aprotinin injection) as more fully described in this notice and the attachments (A and B) hereto. Customs invites comments on the correctness of the proposed revocation.

In Customs Ruling Letter NYRL 856935, issued on October 18, 1990, Customs ruled that Trasylol® (aprotinin) imported for use as a laboratory reagent, was classifiable under subheading 3822.00.5000, Harmonized Tariff Schedule of the United States (Annotated) (HTSUSA). NYRL 856935 is set forth in "Attachment A" to this document.

Customs has been advised that Trasylol® (aprotinin) no longer is imported for use as a laboratory reagent; rather, the merchandise is now used as a cardiovascular medicament. Due to this change in use,

Customs agrees that the merchandise is properly classifiable under subheading 3004.90.9020, HTSUSA, a residual provision for cardiovascular medicaments.

Customs intends to revoke NYRL 856935, to reflect the proper classification of Trasylol® VLE and Trasylol® (aprotinin injection) in subheading 3004.90.9020, HTSUSA. Before taking this action, we will give consideration to any written comments timely received. Proposed Headquarters Ruling Letter 959680 is set forth as "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations 19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: November 19, 1997.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
New York, NY, October 18, 1990.
CLA–2–38:S:N:N1:238 856935
Category: Classification
Tariff No. 3822.00.5000

MR. ROBERT E. BURKE
BARNES, RICHARDSON & COLBURN
200 East Randolph Drive
Chicago, IL 60601

Re: The tariff classification of Trasylol (Aprotinin) solution from West Germany.

DEAR MR. BURKE:

In your letter dated October 2, 1990, on behalf of your client, Miles, Inc., you requested a tariff classification ruling.

Trasylol (Aprotinin) consists of 50ml and 10ml vials containing 10g and 4.0g of Trasylol, respectively, in an isotonic sodium chloride solution. It is a basic polypeptide extracted from bovine lung which is used as a laboratory reagent for broad based proteinase inhibition.

The applicable subheading for the Trasylol will be 3822.00.5000, Harmonized Tariff Schedule of the United States (HTS), which provides for composite diagnostic or laboratory reagents, other than those of heading 3002 or 3006. The rate of duty will be 5 percent *ad valorem*.

This merchandise may be subject to the regulations of the Food and Drug Administration. You may contact them at 5600 Fishers Lane, Rockville, Maryland 20857, telephone number (202) 443–3380.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:CR:GC 959680 EAB
Category: Classification
Tariff No. 3004.90.9020

MR. ROBERT E. BURKE
BARNES, RICHARDSON & COLBURN
200 East Randolph Drive
Chicago, IL 60601

Re: Trasylol® (aprotinin) and Trasylol® VLE (aprotinin injection); NY 856935 revoked.

DEAR MR. BURKE:

This is in reference to NY 856935 issued to you on October 18, 1990, on behalf of Miles, Inc., concerning the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of Trasylol® (aprotinin in isotonic solution). We have reviewed that ruling and determined that it no longer reflects the correct classification of this article.

Facts:

In Customs Ruling Letter NY 856935 dated October 18, 1996), Customs determined that Trasylol® (aprotinin) consisting of 50ml and 10ml vials containing 10 g and 4.0g of Trasylol®, respectively, in an isotonic sodium chloride solution used as a laboratory reagent was classifiable in subheading 3822.00.5000, HTSUSA, a provision for composite diagnostic or laboratory reagents, other than those of heading 3002, 3005 or 3006. Merchandise entered in the foregoing provision in 1996 would be dutiable at the column 1 General rate of 5 percent *ad valorem*.

Currently, Trasylol® and Trasylol® VLE {aprotinin injection) are imported in vials of 50ml and 10ml capacity for use as a cardiovascular medicament. Subheading 3004.90.9020, HTSUSA, is a residual provision for cardiovascular medicaments dutiable at the column 1 General rate of "Free" if entered during calendar year 1997.

Issue:

Whether Trasylol® (aprotinin) and Trasylol® VLE (aprotinin injection) are classifiable as a laboratory reagent or as a medicament.

Law and Analysis:

Merchandise imported into the U.S. is classified under the HTSUSA. Tariff classification is governed by the principles set forth in the General Rules of interpretation (GRIs) and, in the absence of special language or context which otherwise requires, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUSA and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order.

Heading 3822, HTSUSA, provides in part for diagnostic and laboratory reagents.

Heading 3004, HTSUSA, provides for "Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms or packings for retail sale."

In the absence of special language or context which otherwise requires, Additional U.S. Rule of interpretation 1(a) requires that a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the U.S. at, or immediately prior to, the date of importation of goods of that class or kind to which the imported goods belong. Furthermore, the use controlling the classification is the principal use of the goods.

Based upon the information now available to us, we find that the principal use of the Trasylol® (aprotinin) and Trasylol® VLE (aprotinin injection) is as a cardiovascular medicament imported in a form that is classifiable under heading 3004, HTSUSA.

Holding:

Trasylol® (aprotinin) and Trasylol® VLE (aprotinin injection) are classifiable under subheading 3004.90.90, HTSUSA, the provision for cardiovascular medicaments put up in

measured doses or in forms or packings for retail sale, to me entered free of duty during calendar year 1997.

NY 856935 is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

PPROPOSED REVOCATION OF CUSTOMS RULING LETTER RELATING TO IMMEDIATE RELEASE OF QUOTA-CLASS MERCHANDISE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of entry ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the duty rate applicable to quota-class merchandise released uner the immediate delivery procedures. Comments are invited on the correctness of the proposed ruling.

EFFECTIVE DATE: Comments must be received on or before January 9, 1998.

ADDRESS: Written comments (preferable in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: International Trade Compliance Division, located at the Ronald Reagan Building, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the Office of Regulations and Rulings.

FOR FURTHER INFORMATION CONTACT: Craig Clark, Entry Procedures and Carriers Branch, (202) 927–2320.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the duty rate applicable to quota-class merchandise released under the immediate delivery procedures.

Protest 0712–95–100534 was timely filed with Customs in Champlain, New York and thereafter forwarded to our office for review. In response, we issued Headquarters Ruling (HQ) 226322, dated August 7, 1996, in which we granted the protest, finding that an importer may have merchandise subject to a tariff-rate quota released under a special permit for immediate delviery near the end of a quota period and file entry summary at the beginning of a new quota period, in order to have the date of entry and presentation established in the new quota period at a more favorable duty rate. (See "Attachment A" to this document.)

After further analysis of HQ 226322, we belive that the decision was incorrect. In HQ 226322 we failed to cite and apply 19 CFR 142.23 and 19 CFR 142.21(e), which provide that when merchandise subject to a tariff-rate quota is released under a special permit for immediate delivery, entry summary will be properly presented within 10 working days of release, or within the quota period, whichever expires first. Consequently, an importer may not gain release of merchandise subject to a tariff-rate quota at the end of a quota period and file entry summary after the close of the period in order to circumvent the tariff-rate quota in effect at the time of release.

Customs intends to revoke HQ 226322 to reflect the application of the appropriate regulations, 19 CFR 142.23 and 19 CFR 142.21(e), in the situation described above. Before taking this action, consideration will be given to any written comments timely received. The proposed ruling revoking HQ 226322 is set forth in "Attachment B" to this document.

HQ 226322 reflects the final determination with respect to a particular protest. As such, Customs recognizes that it cannot be modified or revoked with respect to the disposition of the entry in that protest. For the reasons stated above, however, Customs can modify or revoke the legal principles set forth in a protest review decision to reflect the proper position of the Customs Service concerning the release of merchandise under a special permit for immediate delivery that is subject to a tariff-rate quota.

Claims for detrimental reliance under section 177.9, Customs Regualtions (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: November 19, 1997.

JERRY LADERBERG,
Acting Director,
International Trade Compliance Division.

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, August 7, 1996.
ENT–5–01/1–03/1–07:RR:IT:EC 226322 AJS
Category: Entry

PORT DIRECTOR OF CUSTOMS
U.S. CUSTOMS SERVICE
COMMERCIAL OPERATIONS
198 West Service Road
Champlain, NY 12919

Re: Protest 0712–95–100534; tariff-rate quota; time of entry; 19 U.S.C. 1315; 19 CFR 141.68(d); 19 CFR 132.1(d); 19 CFR 132.11(a); HQ 225410.

DEAR SIR:

This is our decision in protest 0712–95–100534, dated June 12, 1995, concerning NAFTA duty rates.

Facts:

Protest is made against the assessment of duty charged at the 1994 North American Free Trade Agreement (NAFTA) tariff-rate quota. The protestant asserts that Customs erred in demanding payment of duties at the 1994 rate of duty on a tariff-rate quota entry of apparel goods from Canada to the United States. The protestant also asserts that the 1995 NAFTA tariff-rate quota rate of duty is applicable and the status of the quota should be determined based on date of release.

The entry summary was filed on January 13, 1995. The subject merchandise was exported from Canada under a Certificate of Eligibility for a Tariff Preference Level (TPL) on December 30, 1994. Customs computer records indicate that the merchandise from the subject entry was also released under a special permit for immediate delivery on December 30. The subject merchandise was classified under either subheadings 6204.39.30, 6206.40.30, 6204.69.25, 6204.59.30, 6211.43.00, 6211.49.00 and the special statistical reporting numbers 9999.00.51 or 9999.00.50, Harmonized Tariff Schedule of the United States (HTSUS), for apparel goods imported from Canada under the terms of Additional U.S. note 3 to section XI of the HTSUS.

Issue:

When quota-class merchandise is released under the immediate delivery procedure at the end of a tariff-rate quota period but the entry summary is subsequently filed at the beginning of a new tariff rate quota period, what is the time of entry. More specifically, what is the proper date for determining the applicable tariff-rate quota of the subject merchandise.

Law and Analysis:

Initially, we note that the subject protest was timely filed pursuant to 19 U.S.C. 1514(c)(3)(A). The notice of liquidation as to which protest is made was April 28, 1995, and the date of this protest was June 12, 1995. We also note that the liquidation of an entry is protestable pursuant to 19 U.S.C. 1514(a)(5).

The effective rates of duty for merchandise imported into the United States are provided for in 19 U.S.C. 1315. That statute, as recently amended by section 633 of title VI of the North American Free Trade Agreement Implementation Act (Public Law 103–182; 107 Stat. 2057, 2198), provides, in pertinent part, that:

> (a) Except as otherwise specially provided for, the rate or rates of duty imposed by or pursuant to this chapter or any other law on any article entered for consumption or withdrawn from warehouse for consumption shall be the rate or rates in effect when the documents comprising the entry for consumption or withdrawal from warehouse for consumption and any estimated or liquidated duties then required to be paid have been deposited with the Custom Service by written, electronic or such other means as the Secretary by regulation shall prescribe * * *.

The Customs Regulations issued under this statute and/or pertinent to the issues under consideration are set forth, in part, below:

> Under 19 CFR 141.69, "[t]he rates of duty applicable to merchandise shall be the rates in effect at the time of entry, as specified in section 141.68, except [in cases not pertinent in this case] * * *."

> Section 141.68, referred to above, provides the time of entry for merchandise imported into the United States. Subsection (a) of section 141.68 provides the general rule for establishing the time of entry when entry documentation is filed without an entry summary and subsection (b) of section 141.68 provides the rule for establishing the time of entry when an entry summary serves as both the entry documentation and entry summary. Subsection (c) specifically provides for merchandise released under the immediate delivery procedure (the time of entry is the time the entry summary is filed in the proper form, with estimated duties attached). Subsection (d) specifically provides for the time of entry for quota-class merchandise (i.e., "[t]he time of entry for quota-class merchandise shall be the time of presentation of the entry summary or withdrawal for consumption in proper form, with estimated duties attached or, if the entry/entry summary information and a valid scheduled statement date * * * have been successfully received by Customs via [ABI], without estimated duties attached, as provided in [19 CFR 132.11a]").
>
> Under 19 CFR 132.1(d), "presentation" is defined for purposes of the Customs Regulations pertaining to quota as "the delivery in proper form to the appropriate Customs officer of * * * [a]n entry summary for consumption, which shall serve as both the entry and the entry summary, without estimated duties attached [if ABI procedure, see above, are used] or * * * [a] withdrawal for consumption with estimated duties attached." The time of presentation of an entry/entry summary for quota purposes is the time of delivery in proper form of the above-described documents (i.e., the documents listed in the definition of "presentation") (see 19 CFR 132.11a). Section 132.11(a) states that quota priority and status are determined as of the time of presentation of the entry summary for consumption, or withdrawal for consumption, in proper form in accordance with section 132.1(d). Under 19 CFR 132.1(e), "quota-class merchandise" is defined as "any imported merchandise subject to limitations under an absolute or a tariff-rate quota."

In interpreting these provisions, we are guided by the rule of interpretation that a general rule will not be held to apply to a matter specifically dealt with in another part of the same provision (*Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932); *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 524 (1989). In this case, in 19 CFR 141.68(d), there is a specific rule pertaining to quota-class merchandise (we note that such merchandise includes merchandise subject to limitations under a tariff-rate quota as well as an absolute quota (19 CFR 132.1(e)). Under section 141.68(d), the date of entry for quota-class merchandise is the time of presentation of the entry summary or withdrawal for consumption in proper form with estimated duties attached (unless ABI procedures are used, in which case estimated duties need not be attached). As the more specific provision, this provision prevails over the more general provisions in paragraphs (b) (i.e., when entry summary serves as entry and entry summary at the time of release) and (c) (i.e., when merchandise is released under the immediate delivery procedure) of section 141.68 when the merchandise entered is quota-class merchandise.

We note that this interpretation is consistent with the Customs Regulations relating to quota (19 CFR Part 132), which treat the time of presentation as the time of presentation of the entry/entry summary in proper form, with estimated duties attached (*see* 19 CFR 132.1(d) and 132.11a, described above). (*See also*, in this regard, T.D. 78–228).

In the situation under protest, merchandise (apparel goods) from Canada (for purpose of this ruling, we assume that the apparel goods qualify as a good of Canada under the terms of NAFTA) was released from Customs custody on December 30, 1994, but the entry summary was not filed until January 13, 1995. Moreover, since the goods were released under the immediate delivery procedure, there was no entry until the CF 7501 was filed with estimated duties. *See* 19 U.S.C. 1448(b), 19 CFR 141.68(c) and *Godchaux-Henderson Sugar Co. v. U.S.*, 496 F.Supp 1326, 85 Cust. Ct. 68, 74 (1980). Under the HTSUS, apparel goods entered in 1994 were subject to a tariff-rate quota which permitted a specified quantity of merchandise to be entered or withdrawn for consumption at a reduced duty rate during a specified period (subheadings 6204.39.30, 6206.40.30, 6204.69.25, 6204.59.30, 6211.43.00, 6211.49.00, 9999.00.50, 9999.00.51, HTSUS, and Additional U.S. Note 3(a) and (f), Section XI, HTSUS). As stated previously, section 141.68(d) of the Customs Regulations specifically provides, in pertinent part, that the date of entry for quota-class merchandise is the time of presentation of the entry summary in proper form, with estimated duties attached (unless ABI procedures are used, in which case duties need not be attached). Therefore, the date of entry for this merchandise is the date the entry and entry summary were filed and since this was on January 13, 1995, the merchandise is subject to the 1995 rate of duty. Since the date of entry of the merchandise is in January of 1995, the merchandise must be

entered under the HTSUS tariff provision applicable at that time (i.e., for apparel goods which qualify as a good of Canada under the terms of NAFTA, subheadings 9999.00.50 and 9999.00.51, HTSUS, depending on whether the merchandise is within the quantitative limits specified in U.S. Note 3(f) to section XI). As also stated previously, section 132.11(a) requires quota status and priority to be determined at the time of presentation of the entry summary for consumption in proper form. Therefore, the date for determining whether the specified quantity of merchandise for the tariff-rate quota is filled is also January 13, 1995 (i.e., the date of presentation of the entry summary), and not on December 30, 1994 (i.e., the date of immediate release). *See also* HQ 225410 (September 20, 1994) for a similar discussion of this issue.

Holding:

The protest is granted. The time of entry for determining the applicable tariff-rate quota of the subject merchandise is the time of presentation of the entry summary (i.e., January 13, 1995).

In accordance with Section 3A(11)(b) of Customs Directive 099 3550–065, dated August 4, 1993, Subject: Revised Protest Directive, this decision should be mailed by your office to the protestant no later than 60 days from the date of this letter. Any reliquidation of the entry in accordance with the decision must be accomplished prior to mailing of the decision. Sixty days from the date of the decision the Office of Regulations and Rulings will take steps to make the decision available to Customs personnel via the Customs Rulings Module in ACS and the public via the Diskette Subscription Service, the Freedom of Information Act and other public access channels.

WILLIAM G. ROSOFF,
Director,
International Trade Compliance Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

ENT–5–01/1–03–1–07–RR:IT:EC 114071 CC
Category: Entry

PORT DIRECTOR OF CUSTOMS
U.S. CUSTOMS SERVICE
COMMERCIAL OPERATIONS
198 West Service Road
Champlain, NY 12919

Re: Revocation of HQ 226322; Tariff-rate quota; release under immediate delivery; 19 CFR § 142.23; 19 CFR § 142.21(e); entry summary must be filed prior to 10 working days from release or end of quota period, whichever expires first.

DEAR SIR:

Protest 0712–95–100534 was filed with you, contesting the date of entry for merchandise subject to a tariff-rate quota. The protest was forwarded to our office and we issued Headquarters Ruling (HQ) 266322 on August 7, 1996. In that decision we granted the protest, finding that the date of entry for quota-class merchandise released under the immediate delivery procedure is the date the entry summary is filed, permitting the protestant to pay duty at the rate of the tariff-rate quota under the new quota period when entry summary was filed, rather than the rate due at the time of release. We have reviewed HQ 226322 and believe that it is incorrect.

Facts:

According to the facts presented in HQ 226322, protest was made against the assessment of duty charged at the 1994 North American Free Trade Agreement (NAFTA) tariff-rate quota. The protestant asserted that Customs erred in demanding payment of duties at the

1994 rate of duty on a tariff-rate quota entry of apparel goods from Canada to the United States. The protestant also asserted that the 1995 NAFTA tariff-rate quota rate of duty was applicable, and the status of quota should have been determined based on the date entry summary was filed.

The entry summary was filed on January 13, 1995. The subject merchandise was exported from Canada under a Certificate of Eligibility for a Tariff Preference Level (TPL) on December 30, 1994. Customs computer records indicated that the merchandise from the subject entry was also released under a special permit for immediate delivery on December 30, 1994. The subject merchandise was classified under one of the following subheadings under the Harmonized Tariff Schedule of the United States (HTSUS): 6204.39.30, 6206.40.30, 6204.69.25, 6204.59.30, 6211.43.00, or 6211.49.00. Also, the merchandise was subject to a special statistical reporting number, either 9999.00.51 or 9999.00.50, HTSUS, for apparel goods imported from Canada under the terms of Additional U.S. note 3 to section XI of the HTSUS.

Issue:

May an importer have merchandise subject to a tariff-rate quota released under a special permit for immediate delivery near the end of a quota period and file entry summary after the close of that quota period, in order to have the date of entry and presentation established in the new quota period at a more favorable duty rate.

Law and Analysis:

The effective rates of duty for merchandise imported into the United States are provided for in 19 U.S.C. § 1315. That statute, as amended, provides, in pertinent part, the following:

> (a) Except as otherwise specially provided for, the rate or rates of duty imposed by or pursuant to this chapter or any other law on any article entered for consumption or withdrawn from warehouse for consumption shall be the rate or rates in effect when the documents comprising the entry for consumption or withdrawal from warehouse for consumption and any estimated or liquidated duties then required to be paid have been deposited with the Customs Service by written, electronic or such other means as the Secretary by regulation shall prescribe, except that—
>
> (1) * * *
>
> (2) * * *
>
> (3) any article for which duties may, under section 1505 of this title, be paid at a time later than the time of making entry shall be subject to the rate or rates in effect at the time of entry.

19 U.S.C. § 1505(a) provides, in pertinent part, "[u]nless merchandise is entered for warehouse or transportation, or under bond, the importer of record shall deposit with the Customs Service at the time of making entry or at such later time as the Secretary may prescribe by regulation, the amount of duties and fees estimated to be payable thereon * * *."

Customs Regulations issued pursuant to, or that are relevant to, the above statutes, are set forth, in part, below. 19 CFR § 141.69 provides, "[t]he rates of duty applicable to merchandise shall be the rates in effect at the time of entry, as specified in § 141.68, except [in cases not pertinent in this case] * * *"

19 CFR § 141.68 provides the time of entry for merchandise imported into the United States. Subsection (a) of section 141.68 provides the general rule for establishing the time of entry when entry documentation is filed without an entry summary, and subsection (b) of section 141.68 provides the rule for establishing the time of entry when an entry summary serves as both the entry documentation and entry summary. Subsection (c) specifically provides for merchandise released under the immediate delivery procedure (the time of entry is the time the entry summary is filed in proper form, with estimated duties attached). Subsection (d) specifically provides for the time of entry for quota-class merchandise (i.e., "[t]he time of entry for quota-class merchandise shall be the time of presentation of the entry summary or withdrawal for consumption in proper form, with estimated duties attached or, if the entry/entry summary information and a valid scheduled statement date * * * have been successfully received by Customs via [ABI], without estimated duties attached, as provided in [19 CFR § 132.11a]").

19 CFR § 132.1(e) defines *quota-class merchandise* as "any imported merchandise subject to limitations under an absolute or a tariff-rate quota." 19 CFR § 132.1(d) defines *presentation* as the delivery in proper form to the appropriate Customs officer of essentially the required information and documentation listed above in 19 CFR § 141.68(d). 19 CFR

§ 132.11(a) provides that the time of presentation is the time of delivery in proper form of the above-described information and documentation.

In applying the above law and regulations, in HQ 226322 we stated the following:

> In interpreting these provisions, we are guided by the rule of interpretation that a general rule will not be held to apply to a matter specifically dealt with in another part of the same provision (*Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932); *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 524 (1989). In this case, in 19 CFR 141.68(d), there is a specific rule pertaining to quota-class merchandise (we note that such merchandise includes merchandise subject to limitations under a tariff-rate quota as well as an absolute quota (19 CFR 132.1(e)). Under section 141.68(d), the date of entry for quota-class merchandise is the time of presentation of the entry summary or withdrawal for consumption in proper form with estimated duties attached (unless ABI procedures are used, in which case estimated duties need not be attached). As the more specific provision, this provision prevails over the more general provisions in paragraph (b) (i.e., when entry summary serves as entry and entry summary at the time of release) and (c) (i.e., when merchandise is released under the immediate delivery procedure) of section 141.68 when the merchandise entered is quota-class merchandise.

Although the rule of interpretation stated above in applying a more specific provision over a general one is sound, after further analysis of HQ 226322 we believe the application of that rule of interpretation in that case was incorrect. Concerning the regulations provided for in 19 CFR § 141.68, subsection (b) would not be applicable when goods are released under the immediate delivery procedure. Subsection (c) provides that the date of entry for merchandise released under the immediate delivery procedure is when entry summary is filed with estimated duties attached. As subsection (d) was interpreted in HQ 226322, presentation and the date of entry occurred when entry summary with estimated duties attached was filed, even for merchandise released under the immediate delivery procedure. Therefore, the result in HQ 226322 is the same in applying 19 CFR § 141.68(c) as in applying § 141.68(d), and there would be no need to resort to the rule of interpretation of applying a more specific provision.

There do exist regulations that are specific to the factual situation of HQ 226322, in other words, that apply to quota-class merchandise that has been released under the immediate delivery procedure. Those applicable regulations are 19 CFR § 142.23 and 19 CFR § 142.21(e).

19 CFR § 142.23 provides the time limit for filing documentation after release under a special permit for immediate delivery, stating the following:

> The applicable documentation described in § 142.22(b) shall be filed, and estimated duties, if any, shall be deposited, within 10 working days after the merchandise or any part of the merchandise is authorized for release under a special permit for immediate delivery or, **for quota class merchandise within the quota, whichever expires first** (emphasis added).

19 CFR § 142.21(e) provides that merchandise subject to a tariff-rate quota may be released under a special permit for immediate delivery, and states "[a]n entry summary shall be properly presented pursuant to 19 CFR § 132.1 of this chapter within the time specified in 19 CFR § 142.23, or within the quota period, whichever expires first."

Clearly the regulations provide that for merchandise subject to a tariff-rate quota and released by immediate delivery near the end of a quota period, entry summary must be filed by the end of that quota period if it occurs prior to 10 working days of the date of release. In such a scenario, if the regulations are followed, entry summary would be filed and presentation would occur before the end of the quota period in which release occurred. Consequently, the purpose of the applicable regulations, 19 CFR § 142.23 and 19 CFR § 142.21(e), is clear: to ensure that importers may not gain release of merchandise subject to a tariff-rate quota at the end of a quota period and file entry summary after the close of that period in order to circumvent the tariff-rate quota in effect at the time of release.

In HQ 226322 the merchandise subject to a tariff-rate quota was released under a special permit for immediate delivery on December 30, 1994, near the end of a quota period. (The end of the quota period was December 31, 1994; the beginning of the new quota period was January 1, 1995.) Entry summary was filed on January 13, 1995. Thus, the importer violated the applicable regulations, 19 CFR § 142.23 and 19 CFR § 142.21(e), by not filing entry summary before the end of the quota period (which expired on December 31, 1994) in which the goods were released, since the end of the quota expired prior to 10 working days

from the date of release. Therefore, it was proper for the port to demand duties due at the time of release for merchandise subject to a tariff-rate quota.

We note that in most cases it may not only be impractical, but impossible, to change the date of entry, and thus the date of presentation, from the date entry summary is filed in the new quota period to a date it was required to be filed under the old quota period. Thus it is Customs position, in order to effectuate the requirements and intent of 19 CFR § 142.23 and 19 CFR § 142.21(e), that importers who fail to file entry summary by the close of the quota period in which the goods are released are subject to liquidated damages equal to the difference between the tariff-rate quota in effect at the time of filing of the entry summary and the rate in effect at the time of release under the immediate delivery permit, plus late-file liquidated damages.

Holding:

An importer may not have merchandise subject to a tariff-rate quota released under a special permit for immediate delivery near the end of a quota period and file entry summary after the close of that quota period, in order to have the date of entry and presentation established in the new quota period at a more favorable duty rate.

HQ 226322 reflects the final determination with respect to a particular protest. As such, Customs recognizes that it cannot be modified or revoked with respect to the disposition of the entry in that protest. For the reasons stated above, however, the legal principles set forth in HQ 226322 are hereby revoked and no longer represent the position of the Customs Service concerning the release of merchandise under a special permit for immediate delivery that is subject to a tariff-rate quota.

JERRY LADERBER,
Chief,
Entry Procedures and Carriers Branch.

MODIFICATION OF RULING LETTER RELATING TO SKIDS AND TOTES USED AS INSTRUMENTS OF INTERNATIONAL TRAFFIC

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of ruling concerning instruments of international traffic.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling letter pertaining to articles designated as instruments of international traffic. The components are skids, and plastic and metal totes used to ship industrial component parts, consisting of screws, nuts, washers, spacers and miscellaneous fabricated components made in the United States and shipped to subsidiary plants in Mexico and Canada. The plastic totes described in the ruling letter are marked "Made in Canada" but according to the ruling letter are actually manufactured in the United States. In addition to Customs determination that the articles are instruments of international traffic, the letter notes "parenthetically" that certain of the markings are incorrect pursuant to 15 U.S.C. 1125, which proscribes

false designation and misdescription of goods. This modification removes the paragraph referring to "Made in Canada" and 15 U.S.C. 1125 as inapplicable to the holding of the ruling letter and incorrect in Customs view. Notice of the proposed modification was published on August 6, 1997, in the CUSTOMS BULLETIN, Volume 31, Number 32.

DATE: Merchandise entered or withdrawn from warehouse for consumption on or after February 9, 1998.

FOR FURTHER INFORMATION CONTACT: Michael Smith, Intellectual Property Rights Branch (202) 927–2326.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On August 6, 1997, Customs published in the CUSTOMS BULLETIN, Volume 31, No. 32, a notice of a proposal to modify HQ 113157. HQ 113157, dated August 4, 1994, held that certain articles, namely skids and plastic and metal totes used to ship industrial control components, are instruments of international traffic within the meaning of 19 U.S.C. 1322(a) and 10.41a, Customs Regulations (19 C.F.R. 10.41a). Customs does not consider the holding of the ruling letter to be incorrect, and the modification herein leaves intact that holding.

However, in addition to the holding, the letter parenthetically addressed certain markings found on the totes. Specifically, the letter stated that:

> [T]he plastic totes that are currently manufactured in the United States yet reference Canada as their country of origin are incorrectly marked pursuant to 15 U.S.C. 1125. As products of the United States these articles need no country of origin designation. Consequently, the "Made in Canada" legend appearing on them should be removed.

That conclusion was not made part of the holding of the letter.

Subsequent to the issuance of HQ 113157, counsel for the instruments' user requested that Customs "clarify" the portion of the letter dealing with the marking under 15 U.S.C. 1125 and specifically the requirement that the "Made in Canada" marking be removed.

After reviewing the facts, Customs has determined that the reference to 15 U.S.C. 1125 should be removed. 15 U.S.C. 1125 is intended to prevent confusion among consumers as to the source or sponsorship of the article(s). In this case, there are no consumers of the totes. The shipper of the component parts manufactures the totes, and they are used exclusively by the manufacturer in the conduct of its own business. The manufacturer is not, in Customs opinion, likely to be confused as to the source of its own totes. Therefore, it is now Customs position that 15 U.S.C. 1125 is not applicable in this case, as there is no likelihood of confusion.

No comments were received in response to our notice of intent to modify HQ 113157.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying HQ 113157 by removing the paragraph referring to "Made in Canada" and 15 U.S.C. 1125. The remainder of the letter will remain unaffected. HQ 460528 modifying HQ 113157 is set forth as an attachment to this document.

Dated: November 18, 1997.

JOHN F. ATWOOD,
Acting Director,
International Trade Compliance Division.

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC, November 18, 1997.

BOR–7–07–CO:R:IT:C 460528
Category: Carriers

BRACE N. SHULMAN, ESQ.
STEIN SHOSTAK SHOSTAK & O'HARA
1620 L Street, N.W.
Washington, DC 20036–5605

Re: Instruments of international Traffic; Skids; Totes; 19 U.S.C. § 1322.

DEAR MR. SHULMAN:

This is in response to your letter dated May 8, 1995, in which you ask that Customs reconsider and modify Headquarters (HQ) Ruling Letter 113157, regarding instruments of international traffic. In that ruling, Customs indicated that 15 U.S.C. §1125 was applicable to certain markings on the articles and that said markings should be removed. After reconsideration, we have determined that the reference to 15 U.S.C. §1125 was incorrect and that the ruling should so modified. The modified ruling is set forth below. Other than the deleted paragraph referring to 15 U.S.C. §1125, the FACTS, ANALYSIS and HOLDING are in all other respects identical to HQ 113157.

Facts:

Allen-Bradley Company ("Allen-Bradley") of Milwaukee, Wisconsin, uses certain skids, and plastic and metal totes to ship industrial control component parts, consisting of screws, nuts, washers, spacers and miscellaneous fabricated components made in its Milwaukee facility, to its subsidiary plants in Mexico and Canada. The subsidiaries use these components to build various subassemblies used in Allen-Bradley's industrial control products.

These completed subassemblies are then re-packaged in these various shipping containers and returned to Milwaukee, where they are incorporated into Allen-Bradley's industrial control products.

The Skids, which have welded steel frames with hardwood panels inserted therein, measure 36″ long, 30″ wide, and 7″ high. The metal totes measure approximately 19½″ long and 11½″ wide, and come in three different heights: 4 1/8″; 6″, and; 7 15/16″. The plastic totes measure approximately 20″ long, 11″ wide, and 5½″ high.

Further in regard to the plastic totes, it is stated that although they were originally manufactured in Canada, they are currently being manufactured in the United States. However, the original mold, which references the origin of the totes as being Canadian, is still being used.

Thousands of the aforementioned skids and totes have been produced and are currently in use. Approximately 100 skids per week are shipped between the United States, Canada and Mexico, with each skid containing 50 totes. Copies of drawings and specifications for these articles were enclosed with the ruling request.

Issue:

Whether the skids and totes under consideration which are used to ship industrial control components are instruments of international traffic within the meaning of 19 U.S.C. § 1322(a) and § 10.41a, Customs Regulations (19 CFR § 10.41a).

Law and Analysis:

Title 19, United States Code, §1322(a) (19 U.S.C. §1322(a)), provides that "[v]ehicles and other instruments of international traffic, of any class specified by the Secretary of the Treasury, shall be excepted from the application of the customs laws to such extent and subject to such terms and conditions as may be prescribed in regulations or instructions of the Secretary of the Treasury."

The Customs Regulations issued under the authority of §322(a) are contained in §10.41a (19 CFR § 10.41a). Section 10.41a(a)(1) specifically designates lift vans, cargo vans, shipping tanks, skids, pallets, caul boards, and cores for textile fabrics as instruments of international traffic.

Section 10.41a(a)(1) also authorizes the Commissioner of Customs to designate other times as instruments of international traffic in decisions to be published in the weekly CUSTOMS BULLETIN. Once designated as instruments of international traffic, these items my be released without entry or the payment of duty, subject to the provisions of § 10.41a.

To qualify as an "instrument of international traffic" within the meaning of 19 U.S.C. §1322(a) and the regulation promulgated pursuant thereto (19 CFR § 10.41a et seq.), an article must be used as a container or holder. The article must be substantial, suitable for and capable of repeated use, and used in significant numbers in international traffic. (See subheading 9803.00.50, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), and former Headnote 6(b)(ii), Tariff Schedules of the United States (HTSUS), as well as Headquarters Decisions 104766; 108084; 108658; 109665; and 109702).

The concept of reuse contemplated above is for commercial shipping or transportation purposes, and not incidental or fugitive uses. Tariff Classification Study, Sixth Supplemental Report (May 23, 1963) at 99. *See Holly Stores, Inc. v. United States*, 697 F.2d 1387 (Federal Circuit, 1982).

In *Holly Stores*, supra, the court determined that "reuse" in the context of former General Headnote 6(b)(ii) "has been consistently interpreted to mean practical, commercial reuse, not incidental reuse." (Emphasis added). In that case, articles of clothing were shipped into this country on wire or plastic coat hangers. Evidence showed that the hangers were designed to be, and were of fairly durable construction and that it would be physically possible to reuse them. However, the court found that only about one percent of the hangers were reused in any way at all, and that those uses were of a noncommercial nature. The court held that the uses of these hangers beyond shipping them once from overseas to the United States were purely incidental, and concluded that the hangers were "not designed for, or capable of, reuse". Subsequent Customs rulings on this matter have held that single use is not sufficient; reuse means more than twice (Headquarter rulings 105567 and 108658). Furthermore, it is our position that the burden of proof to establish reuse is on the applicant, even though the applicant may not be the party reusing the instrument.

Upon reviewing Allen-Bradley's request and the accompanying documentation, we have determined that the above requirements for designation as an instrument of international traffic have been met with respect to the skids, and plastic and metal totes in question.

Holding:

The skids, and plastic and metal totes under consideration which are used to ship industrial control components are instruments of international traffic within the meaning of 19 U.S.C. §1322(a) and §10.41a, Customs Regulations (19 CFR §10.41a).

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

PROPOSED MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF A WALLET

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling letter pertaining to the tariff classification of a wallet. The merchandise resembles a clutch or wallet with a leather flap and snap closure. The interior of the article has seven credit card slots, a billfold slot, a utility slot, a place for a checkbook and a separate checkbook cover. The exterior front of the clutch has one open storage pocket and a zippered change pocket. The exterior surface of the merchandise is an expanded vinyl with a thin coat of polyurethane and foam with a cotton fabric backing. The interior is constructed of both thin gauge leather and fabric components.

DATE: Comments must be received on or before January 9, 1998.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to, and may be inspected at, the U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Greg Deutsch, Textile Branch (202) 927–2302.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of a wallet. Customs invites comments as to the correctness of the proposed modification.

In New York Ruling Letter (NY) A87570, dated October 10, 1996 (set forth as "Attachment A" to this document), the merchandise at issue was classified under subheading 4202.22.1500, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), the provision for "Handbags, whether or not with shoulder strap, including those without handle: With outer surface of sheeting of plastic or of textile materials: With outer surface of sheeting of plastic."

It is now Customs position that the merchandise described above is properly classified under subheading 4202.32.1000, HTSUSA, which

provides, in pertinent part, for "Articles of a kind normally carried in the pocket or in the handbag: With outer surface of sheeting of plastic or of textile materials: With outer surface of sheeting of plastic: Of reinforced or laminated plastics."

Customs intends to modify NY A87570, with respect to style LP 1500, in order to classify this merchandise in subheading 4202.32.1000, HTSUSA. The classification of styles LP 50, LP 1600, and 4270, which were also classified in NY A87570, remain unaltered. Before taking this action, we will give consideration to any written comments timely received. Proposed Headquarters Ruling Letter (HQ) 959919, modifying NY A87570, is set forth as "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: November 21, 1997.

MARVIN AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, October 10, 1996.

CLA–2–42:RR:NC:WA:341 NY A87570
Category: Classification
Tariff No. 4202.22.1500 and 4202.32.1000

MR. DONALD S. SIMPSON
BARTHCO TRADE CONSULTANTS INC.
7575 Holstein Ave.
Philadelphia, PA 19153

Re: The tariff classification of a clutch purse, wallets and a coin purse from China.

DEAR MR. SIMPSON:

In your letter dated September 9, 1996 you requested a tariff classification ruling on behalf of A&L Seaman, Inc. You have submitted four samples of ladies accessories each are marked with the tradename "ELLE".

One style is identified as style number LP 1500, a clutch purse. It is manufactured of an outer of an expanded vinyl with a thin coat of polyurethane and foam with a cotton fabric backing. The exterior surface of the polyurethane coat is calendared to give it the appearance of a pebble grain. It has a flap closure of leather with a snap closure. The interior is constructed of both thin gauge leather and fabric components. The interior of the clutch has seven credit cards slots, a bill fold slot, a utility slot, a place for a checkbook and a separate checkbook cover which has an outer surface of the same material as the clutch outer surface and a fabric interior. The exterior front of the clutch has one open storage pocket and a zippered change pocket. The edging appears to be of a very thin material which may be plastic coated. Although it incorporates features of a wallet, taken as a whole it is a clutch purse and has the character of such. It used to carry relatively small personal items such as money, cosmetics, keys etc.

Styles LP 1600 and LP 50 are billfolds. Each are constructed as style LP 1500 and are not designed to carry more than normally carried in a wallet. Item LP 1600 has a leather covered snap flap similar to item LP 1500.

Style 4270 is a key case with coin purse. It is manufactured of materials the same as styles LP 1500, LP 1600 and LP 50. The exterior is calendared to simulate a grain.

Each article is of a kind similar to those which appear as exemplars in the second half of Heading 4202, Harmonized Tariff Schedules of the United States, Annotated. Classification within that Heading is limited to the specific named materials enumerated. Such articles must be either of a named material or wholly or mainly covered with such material to be classified within the Heading. The named materials include leather, composition leather, textile materials, sheeting of plastic, vulcanized fiber, or of paperboard. On the subheading level, classification is according to the outer surface of the article.

The four samples submitted are manufactured of the named materials as provided in the Heading therefore classification will be according to the material of the outer surface.

The applicable subheading for the clutch purse, style LP 1500, will be tariff number 4202.22.1500, Harmonized Tariff Schedule of the United States (HTS), which provides for HANDBAGS with outer surface of sheeting of plastic or of textile materials, with outer surface of sheeting of plastic. The rate of duty will be 19.2 percent *ad valorem*.

The applicable subheading for the billfolds and key case, styles LP 50, LP 1600 and 4270 will be tariff number 4202.32.1000, HTS, which provides for articles of a kind normally carried in the pocket or in the handbag, with outer surface of sheeting of plastic or of textile materials, with outer surface of sheeting of plastic, of reinforced or laminated plastics. The rate of duty will be $0.121 per kilogram and 4.6 percent *ad valorem*.

It is noted that each article is marked "genuine leather" by embossing into the interior leather component. Since the article is composed of both imitation and genuine leather, the ultimate purchaser is likely to be led to believe that the article is wholly of leather. Such marking is subject to Customs Regulation 11.13 C.R. and Title 15 U.S.C. 1125 prohibits the importation of articles which bear composition marking which would tend to mislead or tend to falsely describe or represent the article. It is recommend the marking be such that the leather components are identified. It is suggest the article be marked "interior and trim of genuine leather."

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Kevin Gorman at 212–466–5895.

ROGER J. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 959919 GGD
Category: Classification
Tariff No. 4202.32.1000

MR. HENRY SEAMON
A & L SEAMON, INC.
375 Greenleaf Street
Allentown, PA 18102

Re: Modification of New York Ruling Letter A87570; Tariff Classification of a Clutch Wallet.

DEAR MR. SEAMON:

This is in response to your letter dated October 29, 1996, requesting the modification of New York Ruling Letter (NY) A87570, dated October 10, 1996, issued on your behalf to Barthco Trade Consultants, Inc., regarding the tariff classification of a clutch wallet under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). After careful consideration, we have determined that NY A87570 should be modified with respect to style number LP 1500. Styles numbered LP 50, LP 1600, and 4270 remain unchanged. A sample was submitted to this office for examination. Our response follows.

Facts:

Style number LP 1500 resembles a small clutch or wallet with an outer surface of an expanded vinyl with a thin coat of polyurethane and foam with a cotton fabric backing. The exterior surface of the polyurethane coat is calendered to give it the appearance of a pebble grain. The interior is constructed of both thin gauge leather and fabric components. The merchandise has two folds with a leather flap and a snap closure. The interior of the clutch has seven credit card slots, a billfold slot, a utility slot, a place for a checkbook and a separate checkbook cover which has an outer surface of the same material as the clutch and a fabric interior. The exterior front of the clutch has one open storage pocket and a zippered change pocket. The edging appears to be of a very thin leather material which may be plastic-coated.

Issue:

Whether the subject merchandise is classified in subheading 4202.22, HTSUS, which provides for handbags, or subheading 4202.32, HTSUS, which provides for articles of a kind normally carried in the pocket or in the handbag?

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and GRI.

In NY A87570, Customs classified the article under subheading 4202.22.1500, HTSUSA which provides for "Handbags, whether or not with shoulder strap, including those without handle: With outer surface of sheeting of plastic or of textile materials: With outer surface of sheeting of plastic." You claim that the subject merchandise is properly classified under subheading 4202.32.1000, HTSUSA, which provides for "Articles of a kind normally carried in the pocket or in the handbag: With outer surface of sheeting of plastic or of textile materials: With outer surface of sheeting of plastic: Of reinforced or laminated plastics."

The term "wallet" is not defined in the HTSUS, nor in the applicable EN to heading 4202. However, we note the following definitions of the term "wallet" from lexicographic sources:

> *Essential Terms of Fashion: A Collection of Definitions,* Charlotte M. Calasibetts, Fairchild Publications, 1986: an item used to carry paper money, credit cards, photographs and sometimes with a change purse or space for a check book or pad.

The Fashion Dictionary, Mary Brooks Picken, Funk & Wagnalls, 1973: 1. Flat purse or pocketbook, for carrying either paper money or coins.

Webster's New Collegiate Dictionary, G. & C. Meriam Co., 1977: 1. A bag for carrying miscellaneous articles while traveling; 2A. billfold B. a pocketbook with compartments for change, photographs, cards, and keys.

Webster's New World Dictionary, Third College Edition, Simon & Schuster, Inc., 1988: 1. [Archaic] a knapsack; 2. A flat pocketbook, as of leather, with compartments for paper money, cards, etc.; billfold.

The term "handbag" has been defined as follows:

Essential Terms of Fashion: A Collection of Definitions: Accessory carried primarily by women and girls to hold such items as money, credit cards, and cosmetics.

The Fashion Dictionary: Soft or rigid bag carried in hand or on arm. Size, shape, handle, etc., depend on fashion. Used by women as container for money and pocket-sized accessories.

Webster's New Collegiate Dictionary: 1. Traveling bag; 2. A woman's bag held in the hand or hung from a shoulder strap and used for carrying small personal articles and money.

Webster's New World Dictionary: A bag, usually of leather or cloth, held in the hand or hung by a strap from the arm or shoulder and used, by women, to carry money, keys, and personal effects.

A review of the above-cited definitions of "handbag" reveals that each lexicographic source describes a bag used by women which is designed to carry money, credit cards, keys, and small or pocket-sized personal effects (e.g., a hairbrush, cosmetics, etc.). In HQ 957632, dated March 24, 1995, this office noted that "the determinative feature of a handbag is its ability to hold several objects not associated with a wallet." In this instance, the subject merchandise is fitted to hold objects associated with a wallet, as the item is flat and possesses slots and pockets to hold credit cards, identification cards, paper currency and coins. In addition, it is of a size suitable for carrying in a handbag. Neither the open slit exterior pocket nor the zippered exterior pocket possess sufficient capacity to hold small personal effects which are typically carried in a handbag. Consequently, the merchandise at issue meets the various descriptions of a wallet set forth supra. The article is therefore specifically described by the provision for articles of a kind normally carried in the pocket or in the handbag.

Holding:

Style number LP 1500 is properly classified in subheading 4202.32.1000, HTSUSA, as an article of a kind normally carried in the pocket or in the handbag with outer surface of sheeting of plastic: of reinforced or laminated plastics. The general column one rate of duty is 12.1 cents/kilogram plus 4.6 percent ad valorem.

NY A87570, issued October 10, 1996, is hereby modified.

JOHN DURANT,
Director,
Commercial Rulings Division

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
R. Kenton Musgrave
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Dominick L. DiCarlo

Nicholas Tsoucalas

Clerk

Raymond F. Burghardt

Decisions of the United States Court of International Trade

(Slip Op. 97–149)

AMERICAN PERMAC, INC. PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 94–10–00589

Plaintiff challenges the United States Customs Service's ("Customs") liquidation of three entries of dry cleaning equipment from Germany in April 1994, asserting the entries had become liquidated by operation of law at an earlier date. Plaintiff seeks a refund of excess antidumping duties paid, with appropriate interest. Defendant responds that the entries at issue were not liquidated by operation of law and asserts a counterclaim, pursuant to 28 U.S.C. § 1583, maintaining Customs under-assessed antidumping duties in liquidating the entries in 1994 and that plaintiff is liable for the difference.

Held: This Court finds the entries in question were liquidated by operation of law, and directs Customs to reliquidate the three entries in accordance with this opinion, with applicable interest as provided for by law.

(Dated November 12, 1997)

Barnes, Richardson & Colburn (Rufus E. Jarman, Jr. and *Alan Goggins),* New York, NY, for plaintiff.

Frank W. Hunger, Assistant Attorney General of the United States; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Civil Division, United States Department of Justice *(James A. Curley), Edward N. Maurer,* Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service, Of Counsel, for defendant.

OPINION

CARMAN, *Chief Judge:* This matter is before the Court on cross-motions for summary judgment pursuant to U.S. CIT R. 56(a). Plaintiff offers three alternative arguments in support of its contention the entries of dry cleaning machinery from Germany in question became liquidated by operation of law prior to Customs' liquidation of the entries on April 22, 1994. Plaintiff asserts the entries became liquidated by operation of law "as entered", at the amount of "the duty paid upon entry, not the amount of the bond." (Pl.'s Br. in Supp. of Mot. for Summ. J. ("Pl.'s Br.) at 18.)

In opposing plaintiff's motion for summary judgment, defendant argues the entries at issue were not eligible to become liquidated by opera-

tion of law, and asserts that if the entries did become liquidated by operation of law, "then the liquidated duty is the amount of the bond posted for each entry." (Answer ¶ 40.) Additionally, defendant has filed a counterclaim pursuant to 28 U.S.C. § 1583, maintaining the entries in question were not liquidated correctly in 1994 and that as a result, plaintiff is liable for the difference between the proper antidumping duties and the amount of antidumping duties assessed when the entries were liquidated in 1994.

BACKGROUND

A. The Facts:

This matter concerns three entries of dry cleaning machinery from Germany which entered the United States in late 1979. At the time of its entry into the United States, the imported merchandise was subject to an antidumping duty order, *see Final Determination of Sales at Less Than Fair Value; Drycleaning Machinery From the Federal Republic of Germany*, 37 Fed. Reg. 23,715 (Dep't Comm. 1972), and liquidation of the merchandise was suspended pending the completion of an administrative review covering subject merchandise which entered the United States between July 1, 1979 to June 30, 1980. This final results of the administrative review were published by the Department of Commerce ("Commerce") on January 10, 1985. *See Drycleaning Machinery From West Germany; Final Results of Administrative Review of Dumping Finding*, 50 Fed. Reg. 1,256 (Dep't Comm. 1985).

The findings of Commerce's administrative review were challenged in this Court. In the course of that litigation, the Court issued a preliminary injunction which further suspended liquidation of the merchandise at issue, pending the issuance of a final judgment. Following a remand to Commerce, this Court affirmed the findings made in Commerce's administrative review. *See American Permac, Inc. v. United States*, 13 CIT 487 (1989) *("American Permac I")*. When the time for appeal expired on August 14, 1989, the Court's judgment became final and conclusive. *See* 28 U.S.C. § 2645(c) (1988) (providing a decision by the United States Court of International Trade "is final and conclusive, unless a retrial or rehearing is granted * * * or an appeal is taken to the Court of Appeals for the Federal Circuit by filing a notice of appeal with the clerk of the Court of International Trade within the time and in the manner prescribed").

Once this Court's judgment became final on August 14, 1989, this Court's order suspending liquidation of the entries in question was lifted. *See, e.g., Volume Footwear Retailers of America v. United States*, 10 CIT 12, 14 (1986) (absent special circumstances, "[i]t is abundantly clear that a preliminary injunction dissolves when the case is dismissed or final judgment is entered"). On October 24, 1989, slightly more than two months after this Court's judgment in *American Permac I* became final, the Customs Information Exchange distributed instructions from Commerce to liquidate the entries covered by the administrative review and to assess antidumping duties in accordance with the remand deter-

mination affirmed by this Court in *American Permac I*. The entries at issue were ultimately liquidated by Customs on April 22, 1994, approximately four and one-half years after the Customs Information Exchange issued its liquidation instructions.

B. Statutory Provisions:

The statute principally at issue in this matter is 19 U.S.C. § 1504. The statute in effect at the time this Court's judgment in *American Permac I* became final, and thus when the entries in question were first eligible to be liquidated, provides in relevant part:

> **(a) Liquidation**
>
> Except as provided in subsection (b) of this section, an entry of merchandise not liquidated within one year from:
>
> (1) the date of entry of such merchandise; * * *
>
> shall be deemed liquidated at the rate of duty, value, quantity, and amount of duties asserted at the time of entry by the importer of record. * * *
>
> **(b) Extension**
>
> The Secretary may extend the period in which to liquidate an entry by giving notice of such extension to the importer of record in such form and manner as the Secretary shall prescribe in regulations, if—
>
> * * * * * * *
>
> (2) liquidation is suspended as required by statute or court order; * * *.
>
> * * * * * * *
>
> **(d) Limitation**
>
> Any entry of merchandise not liquidated at the expiration of four years from the applicable date specified in subsection (a) of this section, shall be deemed liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record, unless liquidation continues to be suspended as required by statute or court order. When such a suspension of liquidation is removed, the entry shall be liquidated within 90 days therefrom.

19 U.S.C. § 1504 (1988).

In 1993, 19 U.S.C. § 1504 was amended by the North American Free Trade Agreement Implementation Act, Pub.L.No. 103–182, § 641, 107 Stat. 2057, 2204–05 (1993) [hereinafter "NAFTA Implementation Act"]. The NAFTA Implementation Act revised the statute to provide in relevant part:

> **(d) Removal of Suspension**
>
> Except as provided in section 1675(a)(3) of this title, when a suspension required by statute or court order is removed, the Customs Service shall liquidate the entry within 6 months after receiving notice of the removal from the Department of Commerce, other agency, or a court with jurisdiction over the entry. Any entry not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having been liquidated at the rate of

> duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record.

19 U.S.C. § 1504(d) (1994). This section of the Act took effect on December 8, 1993, the date the Act was signed into law by the President. *See id.* at § 692, 107 Stat. 2225.

CONTENTIONS OF THE PARTIES

A. *Plaintiff:*

Plaintiff raises three principal arguments in support of its position that the entries in question became liquidated by operation of law prior to Customs' purported liquidation of the entries on April 22, 1994. First, plaintiff argues, pursuant to 19 U.S.C. § 1504(d) (1988), the three entries at issue became liquidated by operation of law ninety days after this Court's judgment in *American Permac I* became final. Plaintiff argues "[p]ursuant to [the statute], * * * Customs was required to liquidate the entries within 90 days after the removal of the suspension from liquidation" (Pl.'s Br. at 7), and Customs' failure to liquidate the entries within ninety days after the suspension on liquidation was lifted resulted in the entries being liquidated by operation of law.

Second, plaintiff argues the three entries became liquidated by operation of law as the result of the retroactive application of an amendment made to 19 U.S.C. § 1504(d) by the NAFTA Implementation Act. The amendment provides that entries which have been suspended from liquidation become liquidated by operation of law if they are not liquidated within six months of Customs receiving notice that the suspension of liquidation has been lifted. Plaintiff asserts Customs was on notice the suspension of liquidation had been lifted no later than October 24, 1989, when the Customs Information Exchange issued liquidation instructions addressing the subject merchandise. Plaintiff argues "[s]ince the entries were not liquidated within six months of this date, they were deemed liquidated as entered by operation of law." (Pl.'s Br. at 5.)

Finally, plaintiff argues the three entries were liquidated by operation of law because, according to the plaintiff, "[t]he legislative history and the statute itself clearly demonstrate that 19 U.S.C. § 1504 (1980) is a statute of limitations." (Pl.'s Reply Br. in Supp. of Mot. for Summ. J. and in Opp'n to Def.'s Cross-Mot. for Summ. J. ("Pl.'s Reply Br.") at 6.) Specifically, plaintiff reads 19 U.S.C. § 1504(d) to establish a "four year statute of limitations * * * [which] is tolled until removal of the suspension. Once suspension is removed, running of the statute of limitations commences." *(Id.* at 10.) Plaintiff contends the passage of more than four years between suspension of liquidation of the entries being lifted in 1989 and Customs' purported liquidation of the entries in 1994 resulted in the entries becoming liquidated by operation of law.

B. *Defendant:*

The government responded to plaintiff's assertions by filing a cross-motion for summary judgment, as well as a counterclaim, pursuant to 28 U.S.C. § 1583. In its cross-motion for summary judgment, defendant

rejects plaintiff's first argument, maintaining the entries were not eligible to become liquidated by operation of law pursuant to 19 U.S.C. § 1504(d) (1988) because "entries [that are suspended from liquidation on and after the fourth anniversary of their entry] are not 'deemed liquidated' [pursuant to 19 U.S.C. § 1504(d) (1988)] if liquidation does not take place within 90 days, as it does in the first sentence for entries less than four years old when suspension of liquidation is removed." (Def.'s Br. in Opp'n to Pl.'s Mot. for Summ. J. and in Supp. of Cross-Mot. for Summ. J. ("Def.'s Br.") at 4.)

Defendant maintains Customs did not abuse its discretion despite the passage of nearly four and one-half years from when Customs was instructed to liquidate the entries to their actual liquidation. Defendant asserts "[e]ven assuming for the sake of argument that Customs was not diligent in liquidating the entries, it does not follow that the agency's actions were unreasonable or otherwise amounted to an abuse of discretion." *(Id.* at 9.) Additionally, defendant observes "American Permac has not shown that it suffered any prejudice as a result of the delay", nor has it "shown that it ever inquired of Customs why the entries had not been liquidated, or otherwise took steps to bring about earlier liquidations." *(Id.* at 10.)

Defendant also rejects plaintiff's second argument, asserting 19 U.S.C. § 1504(d) (1994), which reflects amendments included in the NAFTA Implementation Act, does not apply retroactively to liquidate the entries at issue by operation of law. Defendant maintains neither the statutory language of 19 U.S.C. § 1504(d) (1994) nor its legislative history "indicate[s] that the amendment is applicable to entries for which notice of removal of suspension occurred before the amendment took effect." (Def.'s Br. at 13.) In support of this argument, defendant also contends "[w]hen Congress intended the amendments of the NAFTA Implementation Act to apply to entries made prior to the effective date of the Act, it provided expressly for that." *(Id.* at 14 (citing NAFTA Implementation Act, § 632, 107 Stat. 2192).

Similarly, defendant contests plaintiff's third argument, contending plaintiff's assertion that 19 U.S.C. § 1504(d) (1988) should be read to provide a four year statute of limitations is contrary to "the plain meaning of § 1504(d)." (Def.'s Br. at 11.) Defendant argues the statute "does not provide that entries which are four years old when suspension of liquidation is removed, such as we have here, become deemed liquidated [by operation of law]." *(Id.)* Rather, defendant asserts "[t]he only requirement imposed by § 1504(d) on four-year-old entries is that they be liquidated within 90 days, which is directory only." *(Id.)*

Finally, defendant filed a counterclaim pursuant to 28 U.S.C. § 1583, asserting plaintiff is liable for antidumping duties which were under-assessed against certain entries at liquidation. According to defendant, two dry cleaning machines liquidated under entry number 515334–3 and 515210–8 were not assessed the appropriate amount of antidumping duties. Defendant asserts plaintiff is liable for the difference,

$7,186.04, plus interest as provided for in 28 U.S.C. § 2644 from the date the entries were liquidated until the date of payment.

STANDARD OF REVIEW

This case is before the Court on the parties' cross-motions for summary judgment. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." U.S. CIT R. 56(d). After reviewing all the parties' submissions, the Court finds that there is no genuine issue of material fact. As a result, the Court will only address the remaining questions of law.

DISCUSSION

The Court has little difficulty disposing of plaintiff's first and third arguments, which contend the entries became liquidated by operation of law pursuant to 19 U.S.C. § 1504(d) (1988), the version of the statute in effect prior to enactment of the NAFTA Implementation Act on December 8, 1993.

First, the Court rejects plaintiff's argument that the entries in question became liquidated by operation of law pursuant to 19 U.S.C. § 1504(d) (1988) when Customs failed to liquidate the entries within ninety days after the suspension of liquidation was lifted. In making this argument, plaintiff attempts to distinguish *Canadian Fur Trappers Corp. v. United States*, 12 CIT 612, 691 F. Supp. 364 (1988), *aff'd*, 7 Fed. Cir. (T) 136, 884 F.2d 563 (1989), in which the Court clearly held the ninety-day period in § 1504(d) of the pre-NAFTA Implementation Act statute was directory rather than mandatory. Plaintiff's arguments are not persuasive. The Court's holding in *Canadian Fur Trappers Corp.* is unequivocal and clear. *See Canadian Fur Trappers Corp.*, 12 CIT at 618, 691 F. Supp. at 369 ("[T]he statutory language and structure * * * compel [ ] the conclusion that the provision is directory."). This holding was affirmed on appeal by the United States Court of Appeals for the Federal Circuit. *See Canadian Fur Trappers Corp.*, 7 Fed. Cir. (T) at 139, 884 F.2d at 566 ("[T]he lack of consequential language in the latter part of section (d) * * * leads us to conclude that Congress intended this part of section (d) to be only directory.").

Additionally, the Court rejects plaintiff's efforts to argue Congress' passage of the NAFTA Implementation Act in 1993 "implicitly [reflects] that [the *Canadian Fur Trappers*] decision was never the result intended by Congress," (Pl.'s Br. at 8.). The Court is particularly unpersuaded by plaintiff's attempt to characterize the legislative intent of the Congress which originally enacted 19 U.S.C. § 1504(d) by actions taken more than a decade later by a subsequent Congress. *See, e.g., Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117, 100 S.Ct. 2051, 2061, 64 L.Ed.2d 766 (1980) ("[V]iews of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.") (citation omitted); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758, 99

S.Ct. 2066, 2072, 60 L.Ed.2d 609 (1979) (noting "'[i]t is the intent of the Congress that enacted [the provision] * * * that controls'" and subsequent "'[l]egislative observations * * * are in no sense part of the legislative history'" of a statute) (citations omitted). Further, legislative history which directly contradicts plaintiff's argument accompanied passage of the Customs Procedural Reform and Simplification Act of 1978. *See* H.R.Rep. No. 621 95th Cong., 1st Sess. 26 (1977) ("This last provision [in § 1504(d)] is discretionary, rather than mandatory, and recognizes that there will be instances when it may be impossible to complete liquidation within 90 days because of the sheer number of entries to be liquidated after a long-continued suspension.").

The Court also rejects plaintiff's attempt to distinguish the holdings of *Canadian Fur Trappers Corp.* and *Eagle Cement Corp. v. United States*, 17 CIT 624 (1993), *aff'd*, 26 F.3d 137 (Fed. Cir. 1994). While plaintiff correctly observes the Court in *Eagle Cement* states "'Congress intended that Customs act responsibly to liquidate entries promptly after a lengthy suspension has terminated,'" (Pl.'s Br. at 8 (quoting *Eagle Cement Corp.*, 17 CIT at 627)), plaintiff fails to note that *Canadian Fur Trappers Corp.* is cited favorably in *Eagle Cement*. *See Eagle Cement*, 17 CIT at 626 (noting Federal Circuit opinion in *Canadian Fur Trappers Corp.* "is dispositive"). The Court rejects plaintiff's argument, finding the Court's holding in *Eagle Cement* is fully consistent with the holding of *Canadian Fur Trappers Corp.* *Compare Eagle Cement*, 17 CIT at 627 ("[T]he 90 day period of § 1504(d) is directory rather than mandatory."), *with Canadian Fur Trappers Corp.*, 7 Fed. Cir. (T) at 139, 884 F.2d at 566 ("[T]he lack of consequential language in the latter part of section (d) * * * leads us to conclude that Congress intended this part of section (d) to be only directory.").

Second, the Court rejects plaintiff's argument that 19 U.S.C. § 1054(d) (1988) operates as a four-year statute of limitations which caused the entries at issue to become liquidated by operation of law on the fourth anniversary of the lifting of the suspension of liquidation, which occurred when this Court's decision in *American Permac I* became final. The statutory provision, in its entirety, provides:

> **(d) Limitation**
>
> Any entry of merchandise not liquidated at the expiration of four years from the [date of entry] shall be deemed liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record, unless liquidation continues to be suspended as required by statute or court order. When such a suspension of liquidation is removed, the entry shall be liquidated within 90 days therefrom.

19 U.S.C. § 1504(d) (1988). The Court finds the statute clearly delineates the circumstances in which merchandise is eligible to become liquidated by operation of law on the fourth anniversary of its entry into the United States. Only those entries whose liquidation is not suspended on the fourth anniversary of entry into the United States are eligible to be liquidated by operation of law. As for those entries which are

suspended from liquidation as of the fourth anniversary of their entry into the United States, Customs is directed to liquidate them within ninety days of the suspension being terminated. The Court finds a plain reading of the statute in no way indicates the existence of a four-year statute of limitations which operates to liquidate entries by operation of law.

While the Court is not persuaded by plaintiff's contention that pre-NAFTA Implementation Act statute operated to liquidate the three entries at issue by operation of law, plaintiff's arguments and the case law interpreting the statute as originally enacted do highlight the problems created by the lack of any consequences should Customs fail to liquidate entries whose liquidation was suspended past the fourth anniversary of their entry.[1] This issue was addressed in 1993 when Congress passed the NAFTA Implementation Act, which among other things, amended 19 U.S.C. § 1504(d). The statute, as amended, provides that entries not liquidated within six months of Customs receiving notice of the lifting of a suspension on liquidation become liquidated by operation of law. *See* 19 U.S.C. § 1504(d) (1994) ("Any entry not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record.").

Plaintiff contends the statutory language, as amended, resulted in the entries at issue becoming liquidated by operation of law. In making this assertion, plaintiff raises two alternative arguments. The first contends the amendment made to § 1504(d) of the statute by the NAFTA Implementation Act applies retroactively, resulting in liquidation by operation of law on December 8, 1993, the date the NAFTA Implementation Act was signed into law. Plaintiff observes that "[o]n the effective date expressly prescribed by Congress, Customs already possessed the notice of the removal of suspension from liquidation of the entries in question" and six months had passed from the date Customs received notice of the lifting of the suspension of liquidation. (Pl.'s Br. at 11.) Alternatively, plaintiff argues "since all of the prerequisites for [the amended statute's] application were in place on the effective date of the revised statute, the six month period in which Customs was required to liquidate began running no later than December 8, 1993." *(Id.)* Defendant argues this Court should reject plaintiff's arguments because there is no evidence Congress intended the statute to apply retroactively.

As was recently pointed out by the United States Court of Appeals for the Federal Circuit in *Travenol Laboratories, Inc. v. United States,* 118 F.3d 749, 752 (Fed. Cir. 1997), a necessary first step in analyzing whether a statute applies retroactively is examining "whether application of legislation to certain facts constitutes a retroactive application of that law.

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[1] The Court has previously addressed the hardships created by the § 1504(d) as originally enacted and observed reconsideration of this section of the statute by Congress could facilitate timely liquidation of entries. *See Dal-Tile Corp. v. United States*, 17 CIT 764, 772, 829 F. Supp. 394, 400 (1993) ("[I]t would seem appropriate for Congress to reconsider how it can promote certainty in the customs process while also providing Customs sufficient latitude for handling large numbers of entries.").

Only if the answer to that question is 'yes' must we search for a clear expression of congressional intent to apply the law retroactively." In examining the applicability of 19 U.S.C. § 1504(d) (1994) to this matter, the Court determines the amended statute operated to liquidate the three entries at issue by operation of law on December 8, 1993, the date the NAFTA Implementation Act was enacted. The Court notes, however, it does not find this to be a retroactive application of the statute.

In analyzing the language in amended § 1504(d), the Court notes the statute establishes two conditions which must be satisfied before an entry becomes liquidated by operation of law. First, the Customs Service must "receiv[e] notice of the removal [of the suspension of liquidation] from the Department of Commerce, other agency, or a court with jurisdiction over the entry." 19 U.S.C. § 1504(d) (1994). Second, six months must pass from the date Customs is notified of the removal of the suspension without the relevant entries being liquidated. *See id.*

In the instant case, both of those conditions were satisfied prior to the enactment of the NAFTA Implementation Act on December 8, 1993. The parties do not dispute the Customs Information Exchange issued liquidation instructions on October 24, 1989, establishing Customs was on notice the suspension on liquidation had been lifted. Additionally, as of December 8, 1993, more than six months had passed from the time the Customs Information Exchange distributed the liquidation instructions indicating the lifting of the suspension of liquidation of the subject merchandise.

Although the Court is taking into account conduct which occurred prior to the enactment of the NAFTA Implementation Act, the Court does not view this to be a retroactive application of the statute. Rather, as the Federal Circuit noted in *Travenol,* "[t]he mere fact that the new legislation requires reference to antecedent events or data, however, does not make its application retroactive." *Travenol*, 118 F.3d at 754 *(citing Landgraf v. USI Film Prods.*, 511 U.S. 244, 269, 114 S.Ct. 1483, 1499, 128 L.Ed.2d 229 (1994); *McAndrews v. Fleet Bank of Mass., N.A.*, 989 F.2d 13, 16 (1st Cir. 1993)). In this case, the entries at issue satisfied the statutory conditions for liquidation by operation of law on the date the statute became effective. As a result, the Court finds the entries were eligible to, and did indeed become, liquidated by operation of law on December 8, 1993.

A second issue raised by the parties' papers is the amount of antidumping duties due as a result of the entries having become liquidated by operation of law on December 8, 1993. The statute provides entries which are liquidated by operation of law pursuant to 19 U.S.C. § 1504(d) (1994) "shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record." Plaintiff contends "[t]he amount of duties asserted at the time of entry by the importer of record is simply the duties proposed and paid upon entry," (Pl.'s Br. at 18), and therefore concludes "the entries were liquidated by operation of law without the assessment of antidumping duties." (Pl.'s Reply Br. at 3.) Defendants counter that if the

entries became liquidated by operation of law, "then the liquidated duty is the amount of the bond posted for each entry." (Answer at ¶ 40.)

The Court has previously addressed the meaning of the statutory phrase "duty asserted at the time of entry" contained in 19 U.S.C. § 1504(d) (1988).[2] In *Rheem Metalurgica S/A v. United States*, 951 F. Supp. 241 (CIT 1996) (*"Rheem"*), the Court held an importer's noting on the relevant entry papers a countervailing duty investigation number and posting a bond to cover estimated countervailing duties constitutes an "assertion" of duties for the purposes of 19 U.S.C. § 1504(d), and therefore subjects the importer to liability for those duties when the entries become liquidated by operation of law.

In *Rheem*, the Court noted the Customs Service addressed the definition of the term "asserted" in § 1504(d) in a Notice of Final Rulemaking published in 1979. The Rulemaking stated "'asserted' means that which is claimed and indicated by the importer, his consignee or agent on the entry summary or warehouse withdrawal.'" *Rheem*, 951 F. Supp. at 249 (citing *Customs Regulations, Relating to the Entry of Merchandise, Liquidation of Entries, Warehousing Periods, and Marking of Bulk Containers of Alcoholic Beverages, Amended*, 44 Fed. Reg. 46,794, 46,809 (Dep't Treasury 1979)). The Court concluded posting a bond to cover estimated countervailing duties is an action "sufficient to constitute an assertion of countervailing duties" for the purposes of 19 U.S.C. § 1504(d) (1988), and therefore "plaintiff is liable for payment of countervailing duties" when those entries become liquidated by operation of law pursuant to 19 U.S.C. § 1504(d). *Rheem*, 951 F. Supp. 250 (citing *American Permac, Inc. v. United States*, 10 CIT 535, 544 n.12, 642 F. Supp. 1187, 1195 n.12 (1986) ("The amount of duties 'asserted at the time of entry by the importer', within the meaning of § 1504(a) and (d), is not what the importer *desires* to assert upon entry, but what the importer is *required by Customs officers* to assert when filing the entry summary."); *cf. Detroit Zoological Soc. v. United States*, 10 CIT 133, 137 n.9, 630 F. Supp. 1350, 1355 n.9 (1986) ("[T]he rate of duty corresponding to the classification asserted 'at the time of entry' is that which is on the entry summary accepted by Customs and contains *not* what the importer, his consignee, or agent necessarily desires but rather what Customs insists upon as a condition precedent to release of the merchandise.")).

Because the Court finds the three entries in question became liquidated pursuant to 19 U.S.C. § 1504(d) (1994) at an amount which includes bonds posted as security for estimated antidumping duties, the Court finds it unnecessary to address defendant's counterclaims which are predicated on the validity of Customs' liquidation of the three en-

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[2] The relevant statutory language in the NAFTA Implementation Act is virtually identical to the language enacted by the Customs Procedural Reform and Simplification Act of 1978. Both provide that entries liquidated by operation of law are liquidated at "the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record." *Compare* North American Free Trade Implementation Act, Pub. L. No. 103–182, § 641, 107 Stat. 2057, 2204–05 (1993) *with* Customs Procedural Reform and Simplification Act of 1978, Pub. L. No. 95–410, § 209, 92 Stat. 888, 902–03 (1978). The Court notes there is no discussion of the term "assert" in either the legislative history of either the NAFTA Implementation Act or the Customs Procedural Reform and Simplification Act of 1978.

tries in April 1994. The Court will direct Customs to reliquidate the three entries at issue at an amount corresponding to the sum of the amount of regular duties paid and the amount of estimated antidumping duties for which a bond was posted, with interest as provided for by law.

CONCLUSION

The Court finds the three entries at issue became liquidated by operation of law at the rate of regular duties and antidumping duties asserted on the relevant entry papers pursuant to 19 U.S.C. § 1504(d) on December 3, 1993. The Court reaches its determination based on the fact that the two statutory requirements for liquidation of operation of law (i.e., Customs receiving notice of the lifting of the suspension of liquidation, and passage of six months without the entries being liquidated) were satisfied on the date the NAFTA Implementation Act was enacted, and not based on a retroactive application of 19 U.S.C. § 1504(d) (1994). Accordingly, this Court directs the Customs Service to reliquidate the three entries at issue at an amount corresponding to the sum of the amount of regular duties paid and the amount of estimated antidumping duties for which a bond was posted, with interest as provided for by law. All other applications for relief are denied.

(Slip Op. 97–150)

KERR-MCGEE CHEMICAL CORP., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND CHINA HUNAN INTERNATIONAL ECONOMIC DEVELOPMENT (GROUP) CORP., CHINA METALLURGICAL IMPORT & EXPORT HUNAN CORP., AND MINMETALS PRECIOUS & RARE MINERALS IMPORT & EXPORT CORP., DEFENDANT-INTERVENORS

Court No. 96–02–00397

Defendant moves to strike nine items from Plaintiffs' Reply to Defendant's Memorandum in Opposition to Plaintiffs' Motion for Judgment Upon the Administrative Record ("Plaintiffs' Reply") pursuant to U.S. CIT R. 12(f). Defendant argues these nine items contain evidence and argument not presented to, or obtained by, the Department of Commerce ("Department" or "Commerce") during the course of the administrative review and therefore are not properly part of the record for review before this Court.

Plaintiffs argue they were prejudiced in not being allowed to comment on certain actions taken by Commerce in *Notice of Final Determination of Sales at Less Than Fair Value: Manganese Metal From the People's Republic of China*, 60 Fed. Reg. 56,045 (Dep't Comm. 1995) *(final determ.)* and should be allowed to identify what they perceive to be procedural errors made by Commerce in the *Final Determination*. Defendant-intervenors filed no response to defendant's motion.

Plaintiffs additionally move for Oral Argument on Defendant's Motion to Strike, arguing oral argument is necessary for the parties to elaborate fully on the arguments made in the parties' submissions regarding Defendant's Motion to Strike. Neither defendant nor defendant-intervenors responded to Plaintiff's Motion for Oral Argument.

Held: Defendant's Motion to Strike the nine items from Plaintiff's Reply is granted in its entirety. This Court holds the nine items are not part of the record on appeal before this Court and accordingly, will not be considered by this Court in its deliberations. This Court denies Plaintiff's Motion for Oral Argument on Defendant's Motion to Strike.

(Dated November 12, 1997)

Gardner, Carton & Douglas (W.N. Harrell Smith IV, George N. Grammas), for plaintiffs Kerr-McGee Chemical Corporation and Elkem Metals Company.

Frank W. Hunger, Assistant Attorney General of the United States; *David M. Cohen,* Director, *Jeanne E. Davidson,* Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Randi-Sue Rimerman), David J. Ross,* Office of Chief Counsel for Import Administration, United States Department of Commerce, Of Counsel, for defendant.

Dorsey & Whitney (Munford Page Hall, II, Philippe M. Bruno), for defendant-intervenors China Hunan International Economic Development (Group) Corporation, China Metallurgical Import & Export Hunan Corporation, and Minmetals Precious & Rare Minerals Import & Export Corporation.

OPINION

CARMAN, *Chief Judge:* Before this Court is Defendant's Motion to Strike nine items from Plaintiffs' Reply to Defendant's Memorandum in Opposition to Plaintiffs' Motion for Judgment Upon the Administrative Record ("Plaintiffs' Reply") pursuant to U.S. CIT R. 12(f). Defendant argues these portions of Plaintiffs' Reply contain "evidence" and "argument" not presented to, or obtained by, the Department of Commerce ("Department" or "Commerce") during the course of the administrative review and are therefore not properly part of the record for review before this Court.

Plaintiffs oppose defendant's motion and argue they were denied due process in Commerce's *Notice of Final Determination of Sales at Less Than Fair Value: Manganese Metal From the People's Republic of China*, 60 Fed. Reg. 56,045 (Dep't Comm. 1995) *(final determ.)*. Defendant-intervenors filed no response to defendant's motion.

Plaintiffs additionally moved for Oral Argument on Defendant's Motion to Strike, arguing oral argument is necessary for the parties to elaborate fully on the arguments made in the parties' submissions regarding Defendant's Motion to Strike. Neither defendant nor defendant-intervenors responded to Plaintiff's Motion for Oral Argument. This Court has jurisdiction over the matter pursuant to 28 U.S.C. §1581(c) (1988), and for the reasons set forth below, grants Defendant's Motion to Strike the nine items listed below of Plaintiff's Reply and denies Plaintiffs' Motion for Oral Argument on Defendant's Motion to Strike.

DISCUSSION

The standard of review this Court must apply is whether a final determination by Commerce is supported by substantial evidence on the record and is otherwise in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i) (1994). For purposes of judicial review, the Court may consider only materials contained in the administrative record. *See Neuweg Fertigung GmbH v. United States*, 16 CIT 724, 726, 797 F. Supp. 1020, 1022 (1992). The administrative record is defined by statute to consist of:

> (i) a copy of all information *presented to or obtained* by the Secretary, the administering authority, or the Commission *during the course of the administrative proceeding*, including all governmental

> memoranda pertaining to the case and the record of ex parte meetings required to be kept by section 1677f(a)(3) of this title; and
>
> (ii) a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register.

19 U.S.C. § 1516a(b)(2)(A) (1994) (emphasis added). The relevant legislative history sheds light on the meaning of the statutory phrase "during the course of the administrative proceeding". It states:

> *Scope and Standard of Review.*—Judicial review of determinations subject to the provisions of subsection (a)(1) would proceed *upon the basis of information before the relevant decision-maker at the time the decision was rendered* including any information that has been compiled as part of the formal record. The court is not to conduct a trial *de novo* in reviewing such determinations.

S.Rep. No. 96–249 at 247–48 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 633 (emphasis added).

In an earlier slip opinion in this case, this Court emphasized the statutory language cited above has been interpreted by this Court to mean that, barring exceptional circumstances, "'[t]he scope of the record for purposes of judicial review is based upon information which was "before the relevant decision-maker" and was presented and considered "at the time the decision was rendered."'" *Kerr-McGee Chemical Corp. v. United States,* 955 F. Supp. 1466, 1472 (CIT 1997) (denying Plaintiffs' Motion to Settle the Record) (quoting *Beker Industries Corp. v. United* States, 7 CIT 313, 315 (1984)). *See also Neuweg Fertigung GmbH*, 16 CIT at 726, 797 F. Supp. at 1022 ("The case law of this court is very clear that the administrative record 'is limited to the information that was presented to or obtained by the agency making the determination during the particular review proceeding for which section 1516 authorizes judicial review.' 'Any information received by [the ITA] after the particular determination at issue is not part of the reviewable administrative record.'") (citations omitted); *Win-Tex Products, Inc. v. United States*, 16 CIT 760, 763, 797 F. Supp. 1025, 1027 (1992) ("'[R]eview of agency determinations in antidumping proceedings is to be undertaken upon the basis of the record made before the agency.'") (citation omitted); *Rhone Poulenc, Inc. v. United States*, 13 CIT 218, 222, 710 F. Supp. 341, 345 (1989) ("Judicial review of an administrative review of an antidumping duty order is confined to information contained in the administrative record."); *see generally PPG Industries, Inc. v. United States*, 13 CIT 183, 708 F. Supp. 1327 (1989) (judicial review is limited to evidence contained in the administrative record); *Melamine Chemicals, Inc. v. United States*, 2 CIT 113 (1981); *Nakajima All Co., Ltd. v. United States*, 2 CIT 25 (1981).

Defendant argues the nine items it wishes to strike from Plaintiff's Reply contain evidence or argument not presented to, or obtained by, the Department during the course of the administrative review as required by 19 U.S.C. §1516a(b)(2)(A) (1994) and are, therefore, not properly part of the record for review before this Court. Defendant argues

that notwithstanding this case law and precedent, plaintiffs have "again presented to this Court information and argument not presented to Commerce." (Def.'s Mot. to Strike at 5–6 (footnote omitted).) The nine items defendant wishes the Court to strike from Plaintiffs' Reply are:

1. The first paragraph on page 1, which continues to page 2.
2. The last paragraph on page 14, which continued to page 15.
3. The first full paragraph on page 15, which continues to page 17, including footnote 8.
4. The last paragraph on page 28, which continues to page 29.
5. The last paragraph on page 29, which continues to page 30.
6. The last paragraph on page 32, which continues to page 33.
7. The first paragraph on page 34, beginning with line 8 ("Plaintiffs can anticipate the expert submissions that might be made on remand * * *"), to the end of the paragraph.
8. The second half of clause (i) on page 37 ("those reporting the least use * * *").
9. The last paragraph on page 40.

In order to aid the Court in ruling on Defendant's Motion to Strike, the Court requested plaintiffs answer three questions with respect to each of the nine items at issue, and provided the defendant with a chance to respond to plaintiffs' answers. The questions presented by the Court were:

> (1) With respect to each of the nine items that Defendant seeks to strike pursuant to its motion presently before the Court, is the information or argument on the record? If so, please provide a reference to the record or a copy of the relevant excerpt from the record.
> (2) If the item is not on the record, did plaintiffs offer the information or argument to the Department? If plaintiffs offered the information or argument to the Department but the item is not on the record, please explain why it is not on the record.
> (3) If the information or argument was not offered to the Department, do plaintiffs believe they were denied an opportunity to offer the information or argument, and if so, why?

(Pls.' Mem. in Resp. to Req. to Resp. to Certain Ques. from Ct. Rel. to Def.'s Mot. to Strike ("Pls.' Mem.") at 2.) The parties' responses to these questions result in a finding by this Court that each of the nine items cited by the defendant are not part of the administrative record for review and should therefore be stricken from Plaintiffs' Reply.

With respect to items one, two, three, seven and nine, plaintiffs admit theses items are not in the administrative record. The essence of plaintiffs' argument for including these items in the record is the contention plaintiffs were prejudiced when Commerce changed its selection of the surrogate ore utilized in the investigation from ore three, chosen in the *Preliminary Determination* to ore two, chosen in the *Final Determination*. Plaintiffs argue "they could not make arguments they should have been allowed to make and they could not introduce evidence * * * that

they should have been allowed to introduce." (Pls.' Mem. in Opp'n to Def.'s Mot. to Strike ("Pls.'s Opp'n") at 2.) Plaintiffs explain:

> [i]t was for this reason only that Plaintiffs offered this Court a brief statement of some of the arguments that would have been made had the Department followed a lawful procedure
>
> * * * * * * *
>
> * * * The examples of arguments of which Defendant complains were offered only to show that the Department's procedure violated due process and was prejudicial.

(Pls.' Opp'n at 3,4.) This Court notes plaintiffs have not set forth exceptional circumstances to amend the record, such as where a document was considered by the agency and not included in the record. *See Suramerica de Aleaciones Laminadas, C.A. v. United States*, 14 CIT 366, 373–74 (1990), *vacated on other grounds*, 14 CIT 560, 746 F. Supp. 139 (1990), *and rev'd and remanded*, 966 F.2d 660 (Fed. Cir. 1992), *and remanded to agency*, 17 CIT 146, 818 F. Supp. 348 (1993), *and opinion after remand to agency* 17 CIT 776, 841 F. Supp. 1220 (1993), *and aff'd*, 44 F.3d 978 (Fed. Cir. 1994) (court considered evidence submitted to agency in rebuttal to corresponding information from party opponent on which agency at least in part expressly based determination before court for review); *Floral Trade Council v. United States*, 13 CIT 242, 709 F. Supp. 229 (1989) (where documents from earlier underlying investigations had been reviewed by Commerce in course of scope proceedings but excluded from administrative record for review, court held documents sufficiently intertwined with relevant inquiry were part of record for review); *see also Mitsuboshi Belting Ltd. v. United States*, 18 CIT 98 (1994) (court denied application to supplement record because plaintiffs had opportunity to submit information during review and situation could not be equated with "exceptional" or "rare" circumstance); *Hosiden Corp. v. United States*, 16 CIT 81 (1992) (motion to amend administrative record to remove doctor's report denied because agency examined report and report is thus properly part of administrative record); *Star-Kist Foods, Inc., v. United States*, 8 CIT 305, 600 F. Supp. 212 (1984) (plaintiff's motion to supplement administrative record denied because although contested documents were relevant to administrative proceeding below, they were never presented to or obtained by Commerce Department during its investigation).

Noting further plaintiffs' own acknowledgment that these items are not in the record, this Court grants defendant's motion to strike items one, two, three, seven and nine from Plaintiff's Reply. Moreover, this Court has already responded to plaintiffs' arguments they were denied an opportunity to contest Commerce's substitution of a surrogate ore. *See Kerr-McGee Chemical Corp.*, 955 F. Supp. at 1474–75 (Court denied plaintiffs' application to supplement record with comments regarding inappropriate ore selection after finding plaintiffs were on notice Commerce was considering ore two as surrogate long before it changed ores between preliminary and final determination).

While claiming items four, five and six are in the record, plaintiffs' support their position by citing to their own Reply in this motion as well as to pages in the administrative record that simply do not support their argument. Defendant's motion to strike items four, five and six from Plaintiff's Reply is granted.

As to item eight, plaintiffs acknowledge that it is not in the administrative record and cite to their own Memorandum in Opposition to Defendant's Motion to Strike. *(See* Pls.' Mem. in Opp'n to Def.'s Mot. to Strike at 9.) Plaintiffs offer no special circumstances to amend the record. Defendants motion to strike item eight from Plaintiffs' Reply is granted.

This Court denies Plaintiff's Motion for Oral Argument on Defendant's Motion to Strike, finding oral argument will not aid the Court in reaching a decision on Defendant's Motion to Strike.

CONCLUSION

After considering the arguments of the parties in their motion papers, as well as the additional information supplied by the parties' responses to the three questions posed by the Court, this Court grants in its entirety Defendant's Motion to Strike items one, two, three, four, five, six, seven, eight and nine from Plaintiff's Reply. The nine items will not be considered as part of the administrative record in this proceeding. Accordingly, they will not be considered by this Court as a part of the record on appeal.

(Slip Op. 97–151)

WRITING INSTRUMENT MANUFACTURERS ASSOCIATION, PENCIL SECTION, ET AL., PLAINTIFFS *v.* U.S. DEPARTMENT OF COMMERCE, DEFENDANT, AND CHINA FIRST PENCIL CO., INC., ET AL., DEFENDANT-INTERVENORS

Court No. 95–01–00081

[Plaintiffs and defendant-intervenors challenge Commerce's methodology employed in calculating the surrogate prices and the subsequent use of those surrogate prices in the calculation of foreign market value in Commerce's Remand Determination. *Held:* Commerce's methodology and determinations on surrogate prices and dumping margins are based on substantial evidence and otherwise in accordance with law. The Court affirms the Remand Determination in all respects.]

(Decided November 13, 1997)

Neville, Peterson & Williams (John M. Peterson, George W. Thompson and Peter J. Allen) for plaintiffs.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Velta A. Melnbrencis);* of counsel: *Barbara Campbell-Potter,* Office of the Chief Counsel for Import Administration, United States Department of Commerce, for defendant.

Dickstein, Shapiro & Morin, L.L.P. (Francis J. Sailer and Sarah M. Efthymiou) for defendant-intervenors.

OPINION

MUSGRAVE, *Judge:* Plaintiffs brought this action to contest the Remand Determination of the *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cased Pencils From the People's Republic of China*, 59 Fed. Reg. 55,625 (1994) ("Final Determination"). Plaintiffs contest the Remand Determination with respect to eight issues: (1) Commerce's use of U.S. basswood prices as a surrogate; (2) Commerce's use of Pakistani surrogate values for lacquer, ferrules and erasers; (3) Commerce's failure to use import tariffs in its calculation of foreign market value; (4) Commerce's failure to use actual transportation and general, selling and administrative costs; (5) Commerce's granting separate rates to the four exporters; (6) Commerce's wood slat surrogate valuation; (7) Commerce's log surrogate valuation; and (8) Commerce's calculation of the "all others" rate. Defendant-intervenors contest the Remand Determination's wood slat surrogate valuation. The Court affirms the Remand Determination in all respects for the reasons that follow.

BACKGROUND

On November 10, 1993, plaintiffs, the Pencil Section of the Writing Instrument Manufacturers Association ("WIMA") composed of Dixon-Ticonderoga Corp., Empire Berol Corp., Faber-Castell Corp., General Pencil Company, J.R. Moon Pencil Company and Musgrave Pen & Pencil Co., filed an antidumping petition with the United States Department of Commerce ("Commerce") and the United States International Trade Commission ("ITC") alleging that pencils from the People's Republic of China ("PRC") were being sold at prices below fair market value to the detriment of the domestic pencil industry. On December 8, 1993, Commerce initiated an antidumping investigation on cased pencils from the PRC covering the period of investigation ("POI") from June 1, 1993 through November 30, 1993. *Initiation of Antidumping Duty Investigations: Certain Cased Pencils From the People's Republic of China and Thailand*, 58 Fed. Reg. 64,548 (1993). On December 20, 1993, the ITC determined that there was a reasonable indication that cased pencils from the PRC were causing material injury to the domestic industry. *Certain Cased Pencils From the People's Republic of China and Thailand*, 59 Fed. Reg. 593 (1994).

Three Chinese pencil manufacturers filed appearances as parties to the Commerce proceeding: China First Pencil Co. ("China First"), Shanghai Three Star Stationery Industry Corporation ("Three Star") and Anhui Stationery Company ("Anhui"). Four Chinese pencil exporters were also parties to the Commerce proceeding: China First, Shanghai Foreign Trade Corporation ("SFTC"), Shanghai Langsheng Corporation ("Langsheng"), and Guangdong Provincial Stationery & Sporting Goods Import & Export Corporation ("Guangdong"). On June 8, 1994, Commerce made a preliminary determination that pencils from the PRC were sold at less than fair value ("LTFV"). *Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Cased*

Pencils from the People's Republic of China, 59 Fed. Reg. 30,911 (1994). In the preliminary determination, Commerce found the following separate weighted-average dumping margins for pencil exporters from the PRC: Guangdong—58.34%, SFTC—100.98%, Langsheng—100.98% and all others/country-wide—107.63%. *Id.*

From July 4 through 15, 1994, Commerce conducted a verification of the responses of the manufacturers and exporters and interested parties were given the opportunity to submit written comments concerning the investigation. A public hearing was held on October 5, 1994. Commerce issued its Final Determination finding the following separate weighted-average dumping margins for the four participating exporters that requested separate rates:

(1) China First, purchases from manufacturer "Company A"—0%;
(2) China First, purchases from any other manufacturer—44.66%;
(3) Guangdong, purchases from manufacturer "Company B"—0%;
(4) Guangdong, purchases from any other manufacturer—44.66%;
(5) SFTC—8.31%; and
(6) Lansheng—17.45%.

Notice of Final Determination of Sales at Less Than Fair Value: Certain Cased Pencils from the People's Republic of China, 59 Fed. Reg. 55,625, 55,631 (1994). Commerce assigned the country-wide/all others rate of 44.66% to non-participating respondents. *Id.*

On December 15, 1994, the ITC reached a final affirmative determination that cased pencils from the PRC were threatening the domestic industry with material injury. *Certain Cased Pencils From the People's Republic of China*, 59 Fed. Reg. 65,788 (1994). Commerce subsequently issued an antidumping duty order on cased pencils from the PRC where Company A was identified as China First and Company B was identified as Three Star. *Antidumping Duty Order: Certain Cased Pencils From the People's Republic of China*, 59 Fed. Reg. 66,909 (1994).

Plaintiffs filed a summons and complaint on January 25, 1995 alleging, *inter alia*, that Commerce failed to provide the plaintiffs adequate opportunity to supply pricing information on United States basswood, which Commerce adopted as the surrogate wood in valuing the PRC lindenwood used in the actual production of the pencils at issue. Plaintiffs also attacked Commerce's use of the United States as a surrogate market economy. During the investigation, Commerce determined that the PRC was a non-market economy ("NME") country and chose India as the preferred surrogate country but also used surrogate data from Pakistan, Indonesia and the United States. Finally, plaintiffs argued that Commerce employed incorrect methodology in valuing basswood slats and logs.

Based on a motion from Commerce, the Court remanded the case in order to (1) reopen the administrative record for submission of publicly available published information ("PAPI") by plaintiffs and any other corroborating information regarding U.S. basswood prices by defendant-intervenors and (2) reopen the administrative record for submis-

sion of PAPI and corroborating information regarding the appropriate methodology for valuing basswood slats and logs.

Commerce issued its Remand Determination on March 22, 1996. Commerce decided to rely on PAPI regarding U.S. basswood pricing utilized in the Final Determination rather than the private studies submitted by plaintiffs in an effort to "increase predictability and certainty." Def.'s Br. at 19. Commerce also found that it was appropriate to change the methodology used to value logs and slats which resulted in recalculation of the average-weighted dumping margins. Both the plaintiffs and defendant-intervenors disputed the Remand Determination results and the Court now determines whether the Remand Determination is supported by substantial evidence and in accordance with law.

STANDARD OF REVIEW

In reviewing a final antidumping determination, the Court "shall hold unlawful any determination, finding, or conclusion found * * * to be unsupported by substantial evidence on the record, or otherwise not in accordance with law, * * *" 19 U.S.C. § 1516a(b)(1)(B) (1994). Under this standard, the Court first reviews the agency's methodology to ensure that it is a reasonable means of administering the antidumping statute. The Court will "evaluate for reasonableness the way in which Commerce chose to interpret" the statute it is applying. *Micron Technology, Inc. v. United States*, 15 Fed. Cir (T) ____, ____, 117 F.3d 1386, 1396 (1997). Where the statute is clear, the Court "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, Inc., 467 U.S. 837, 843 (1983). Where the statute is unsettled, the Court reviews "whether the agency's answer is based on a permissible construction of the statute." *Id.*

The Court then reviews whether the agency's determinations are supported by substantial evidence on the record. "As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomantana, S.A. v. United States*, 10 CIT 399, 404–5, 636 F. Supp. 961, 966 (1986), *aff'd* 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987) (citations omitted). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (citation omitted). "[Substantial evidence] is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966) (citations omitted).

DISCUSSION

Commerce is directed to apply the antidumping provisions contained in the statute in order to determine the dumping margins in its investigation. The United States antidumping provision compares a product's home market sales price to the product's United States sales price. When the home market price, also known as the foreign market value, exceeds the selling price in the U.S., the difference is calculated and imposed as a duty on the imported merchandise. The United States Code antidumping provision is straightforward:

19 U.S.C. § 1673. Imposition of antidumping duties

> If—
>
> (1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and
>
> (2) the Commission determines that—
>
> (A) an industry in the United States—
>
> (i) is materially injured, or
>
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,
>
> then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise.

19 U.S.C. § 1673 (1988). In other words, when: (1) Commerce determines that merchandise is being sold or about to be sold in the U.S. at a price less than what the merchandise sells for in its home market (less than fair value ("LTFV")); and (2) the ITC determines that the U.S. domestic industry producing the same merchandise is suffering or likely to suffer direct harm from the importation of the foreign merchandise; then (3) Commerce shall impose a duty on that foreign merchandise equal to the difference between its U.S. selling price ("USP") and its foreign market value ("FMV"). The duty imposed by Commerce, called the "antidumping duty" or "dumping margin," thereby corrects for the dumping effects in the U.S. market by raising the U.S. selling price to the same price as the merchandise sells in its home market.

While the antidumping statute is straightforward, its interpretation and administration have been anything but absolute. In the instant case, Commerce made a determination that cased pencils from the PRC were being sold in the U.S. for less than fair value and the ITC found that these sales at LTFV threatened the domestic industry with material injury. Due to Commerce's finding that the PRC is a NME country, Commerce had to calculate the foreign market value of the cased pencils using constructed value and factors of production based on prices from

surrogate countries. Commerce found that India and Pakistan were the preferred surrogate countries for surrogate prices but Commerce also used prices from Indonesia and the U.S. It is Commerce's use of these surrogate prices and the methodology that Commerce employed in calculating the surrogate prices that plaintiffs and defendant-intervenors bring before the Court for review. The Court finds that Commerce's determination in its Remand Determination is supported by substantial evidence and in accordance with law for the reasons that follow.

I. Surrogate Pricing Methodology

A. Due Process Claim

As a threshold matter, plaintiffs contend that the tardiness of Commerce's request for U.S. basswood pricing as a surrogate for the PRC lindenwood used in the production of the subject merchandise violated plaintiffs' due process rights and "constituted prejudicial error." Plts.' Reply Br. at 32. The Court recognized the importance of the pricing of wood in constructing the FMV of cased pencils and remanded this precise issue to ensure that Commerce had information submitted from all interested parties. Therefore, the Court finds that all parties had ample opportunity to present information on surrogate wood pricing. Even though plaintiffs petitioned the Court to remand the issue to Commerce in order to obtain U.S. basswood prices, they now contend that remanding the issue does not cure the harm plaintiffs suffered and, further, that the only remedy available for the tardy submission of the surrogate prices is the exclusion of the information from the record and recalculation of the dumping margins. *Id.* at 37.

The Court notes that it is not uncommon for issues that were not considered, or not properly considered, in dumping investigations to be remanded to Commerce for reconsideration. To the extent that plaintiffs challenge the Court's power to remand the issues at hand, 28 U.S.C. § 2106 directs appellate courts to "affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106 (1994). In addition, 28 U.S.C. § 2347(c) provides:

> If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that—
>
> (1) the additional evidence is material; and
>
> (2) there were reasonable grounds for failure to adduce the evidence before the agency;
>
> the court may order the additional evidence and any counterevidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and may modify or set aside its order, and shall file in the court the additional evidence, the

> modified findings or new findings, and the modified order or the order setting aside the original order.

28 U.S.C. § 2347(c) (1994). Subject to the Court's discretion as an appellate court in this matter, the Court made the determination that the record needed to be reopened to obtain information on U.S. basswood pricing and methodology and remanded the case to Commerce. The Court finds that plaintiffs' due process rights were not violated and further finds that plaintiffs had ample opportunity to submit pertinent information.

B. The Use of U.S. Basswood Pricing

Subject to the antidumping statute,[1] Commerce determined that the PRC was an NME country and that Commerce would calculate FMV based on factors of production in one or more market economy countries. Commerce ascertained the value of each component, or factor, of pencil production by selecting an appropriate surrogate market economy country to formulate the FMV. Commerce concluded that India was the preferred surrogate market economy country but Commerce also used surrogate prices from other countries in the preliminary and Final Determinations.

In the preliminary determination of FMV, Commerce searched for an appropriate surrogate price for Chinese lindenwood, the most significant factor of production in PRC pencils. The Chinese lindenwood comprised half of the value of pencils; the selected surrogate price would necessarily have a corresponding impact on the resulting FMV. Chinese lindenwood is a wood that is indigenous only to the PRC and represents a unique factor of production. Commerce encountered significant difficulty in obtaining comparable surrogate values for Chinese lindenwood. In the preliminary determination, Commerce used the Asian market price for a basket category of woods imported into India, which included jelutong wood, as a surrogate for the Chinese lindenwood. Jelutong wood is a similar wood to Chinese lindenwood and is used in pencil production. In the Final Determination, however, Commerce decided to utilize U.S. basswood as the Chinese lindenwood surrogate. Commerce used U.S. basswood based on the opinion of industry experts that basswood is "nearly indistinguishable" from Chinese lindenwood while jelutong is only "quite similar." *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cased Pencils from the People's Republic of China*, 59 Fed. Reg. 55,625, 55,629 (1994). Commerce admits that this information was available at the time of the preliminary determination but a surrogate value for basswood was not available. *Id.*

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[1] In determining foreign market value, under 19 U.S.C. § 1677b(c), a nonmarket economy county exists when:

> (A) the merchandise under investigation is exported from a nonmarket economy country, and
> (B) the administering authority finds that available information does not permit the foreign market value of the merchandise to be determined under subsection (a) of this section,
>
> the administering authority shall determine the foreign market value of the merchandise on the basis of the value of the factors of production utilized in producing the merchandise * * * the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority.

19 U.S.C. § 1677b(c) (1988).

Plaintiffs contend that Commerce's switch from the Indian surrogate price of jelutong to U.S. basswood represents an impermissible application of the FMV and NME statutes. Specifically, plaintiffs argue that the primary objective of the statute is to determine a preferred surrogate market economy country or countries and use the most similar factor of production within that surrogate. Plaintiffs assert that the use of any surrogate prices from the U.S. frustrates the statute since the U.S. market economy is not at a level of economic development comparable to that of the PRC's economy. Plts.' Reply Br. at 10–15. Commerce maintains that the statute "directs Commerce to consider the particular factor of production for which valuation is sought whenever Commerce employs the factors of production methodology." Def.'s Br. at 36. The Court finds that the paramount objective of the statute is to obtain the most accurate determination of dumping margins utilizing the best information available within the broad outlines of the statute. Commerce's use of U.S. basswood is consistent with the primary objective of the statute and is supported by substantial evidence and otherwise in accordance with law.

Under 19 U.S.C. § 1677b(c)(2), Commerce, as the administering authority, is charged with determining the FMV in a NME as follows:

> the administering authority shall determine the foreign market value on the basis of the price at which merchandise that is—
>
> (A) comparable to the merchandise under investigation, and
>
> (B) produced in one or more market economy countries that are at a level of economic development comparable to that of the nonmarket economy country,
>
> is sold in other countries, including the United States.

19 U.S.C. § 1677b(c)(2) (1988). Factors of production are calculated as follows:

> the administering authority shall determine the foreign market value of the merchandise on the basis of the value of the factors of production utilized in producing the merchandise * * * the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority.

19 U.S.C. § 1677b(c) (1988). Valuation of the factors of production is ascertained as follows:

> The administering authority, in valuing factors of production * * * shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are—
>
> (A) at a level of economic development comparable to that of the nonmarket economy country, and
>
> (B) significant producers of comparable merchandise.

19 U.S.C. § 1677b(c)(4) (1988).

Underlying the various sections of the antidumping statute is the paramount objective of determining the most accurate dumping margins

which entails using the best information available ("BIA"). The Court of Appeals for the Federal Circuit ("CAFC") has established that accuracy is the central purpose of the antidumping statute. In *Rhone Poulenc, Inc. v. United States*, 8 Fed. Cir. (T) 61, 899 F.2d 1185 (1990), the CAFC found that "the basic purpose of the [antidumping] statute [is] determining current margins as accurately as possible." *Id.* at 8 Fed. Cir. (T) 68, 899 F.2d 1191. Similarly, in *Allied-Signal Aerospace Co. v. United States*, 11 Fed. Cir. (T) ____, 996 F.2d 1185 (1993), the court found that

> the ITA's new policy is consistent with the statutory purpose underlying the BIA rules provided in 19 U.S.C. § 1677e, which is to facilitate the determination of dumping margins as accurately as possible within the confines of extremely short statutory deadlines.

Id. at 11 Fed. Cir (T) ____, 996 F.2d 1191. Most recently, the court stated that

> [t]he purpose of the [Tariff] Act is to prevent dumping, an activity defined in terms of the marketplace. The Act sets forth procedures in an effort to determine margins "as accurately as possible."

Lasko Metal Products, Inc. v. United States, 12 Fed. Cir. (T) ____, ____, 43 F.3d 1442, 1446 (1994) (citation omitted).

Commerce holds a mélange of tools to effectuate the purpose of finding the most accurate dumping margins under the statute. Of most utility here, 19 U.S.C. § 1677b(c)(1) directs Commerce to value factors of production "in a market economy country or countries [Commerce] consider[s] to be appropriate."

While the Court recognizes that Commerce's focus is on obtaining pricing for factors of production from a surrogate country at or near the same economic level of development, the statute specifically states "to the extent possible" and specifically contemplates the use of pricing from the United States. Plaintiffs contend that the "lodestar for valuing factor[s] of production"[2] under the statute is on "the comparability of economies in the home market and surrogate, not on the comparability of inputs * * *." Plts.' Br. at 17 (emphasis omitted). However, even plaintiffs admit that "Congress recognized that valuing factors of production (materials and labor) with reference to a comparable economy would yield the fairest, most accurate comparisons." Plts.' Reply Br. at FN 2. The Court finds that Commerce's direction to determine comparable market economy countries is merely a means of achieving the primary end, which is determining the most accurate dumping margins possible. Plaintiffs' arguments have lost sight of the proverbial forest. In addition, courts have found that the statute, "does not say—anywhere—that the factors of production must be ascertained in a single fashion." *Lasko Metal Products, Inc. v. United States*, 12 Fed. Cir. (T) ____, ____, 43 F.3d 1442, 1446 (1994). The Court finds that Commerce's use of U.S. basswood prices to value Chinese lindenwood falls within the discretion granted to Commerce in administering the antidumping statute.

[2] Plts.' Reply Br. at 7.

Plaintiffs maintain that the agency regulations contained in 19 C.F.R. § 353.52 prevents Commerce from utilizing surrogate values from any country that is not comparable in economic development such as the United States. Plt.s Reply Br. at 11. Plaintiffs claim that Commerce is required to strictly follow their own regulations. While that may be true, the Court is not bound by the agency regulations, but rather is obliged to apply the statutory provisions contained in 19 U.S.C. § 1677b. When plaintiffs observe that Commerce "largely focuses on the language of the statute, 19 U.S.C. § 1677b(c)(1)" to the neglect of Commerce's own regulations, plaintiffs inadvertently describe the force of law: the procedures contained in 19 C.F.R. § 353.52 are merely Commerce's own interpretation of the administration of 19 U.S.C. § 1677b(c)(1). 19 C.F.R. § 353.52 does not stand on its own and it does not have the force of the law. Commerce was correct in focusing on the provisions of the statute and not its own regulations.

Even under Commerce's regulations, plaintiffs contentions are misplaced. Plaintiffs assert that 19 C.F.R. § 353.52(c) stands alone when Commerce utilizes the factor of production analysis. Under 19 C.F.R. § 353.52(c), Commerce "will value the factors production in a non-state-controlled-economy country which the Secretary considers comparable in economic development to the home market country." 19 C.F.R. § 353.52(c) (1989). Plaintiffs contend that this language precludes Commerce from utilizing any surrogate values from the United States since it is not a comparable economy country. 19 C.F.R. § 353.52(b) specifically contemplates the use of values from the United States but plaintiffs contend that subsection (b) applies only to subsection (a) and subsection (a) applies only when sales prices or constructed value is used as the basis for FMV, neither of which are used in the present case. The Court finds that 19 C.F.R. § 353.52 is an integrated implementing regulation that allows Commerce the discretion to utilize surrogate values from market economy countries provided the overarching objective of accuracy is achieved. Plaintiffs' attempt to separate subsection (c) from subsections (a) and (b) must fail since the plain reading of the factors of production analysis elucidated in subsection (c) is simply a means of deriving constructed value delineated in subsections (a) and (b). Without a link to constructed value, subsection (c) is rendered meaningless. The CAFC has found that the antidumping statute

> simply does not say—anywhere—that the factors of production must be ascertained in a single fashion. The [statute] requires the ITA determination to be based on the "best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority."

Lasko Metal Products, Inc. v. United States, 12 Fed. Cir. (T) ____, ____, 43 F.3d 1442, 1446 (1994).

The Court finds that Commerce acted within the primary objective of determining the most accurate dumping margins by using U.S. bass-

wood prices to value Chinese lindenwood. Plaintiffs never assert that jelutong provides a more accurate value than does basswood. All of the evidence provided to the Court cites the most similar wood to Chinese lindenwood to be U.S. basswood. The Court finds that Commerce's use of U.S. basswood prices as a surrogate for Chinese lindenwood is based on substantial evidence and otherwise in accordance with law.

C. LACQUER, FERRULE AND ERASER SURROGATE PRICING

In the Preliminary Determination, Commerce used Indian import statistics for the pencil ferrules and an "import statistics category identified by the respondent" for the pencil paint or lacquer. *Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Cased Pencils From the People's Republic of China*, 59 Fed. Reg. 30,911, 30,914 (1994). Respondents questioned the quality of the Indian prices and Commerce decided "that the Indian values for ferrules, erasers and paint were aberrational." *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cased Pencils From the People's Republic of China*, 59 Fed. Reg. 55,625, 55,630 (1994). Commerce valued ferrules, erasers and lacquer, using Pakistani import statistics. *Id.* Plaintiffs challenge Commerce's determination that the Indian import statistics were aberrational asserting that the decision was "based on several demonstrably false premises, and should be rejected * * *." Plts.' Reply Br. at 43.

The Court finds that Commerce acted within its discretion in using Pakistani import values for ferrules, erasers and lacquer. Commerce compared the difference between Indian values and the benchmark U.S. values to the difference between the Pakistani values and the U.S. benchmark values for the three materials. Def.'s Br. at 11. The U.S. benchmark values were provided in the antidumping petition by plaintiffs and represented the only other source of prices for these inputs. *Id.* In the results of the comparison, Commerce found an "extraordinarily high difference between the Indian value and the benchmark U.S. value for these factors, when compared to the difference between the Pakistani value and the benchmark U.S. value." *Id.* (citation omitted). In addition, Commerce determined that the Pakistani values were based on more "commercially reliable import values." *Id.* at 55.

Plaintiffs impugned Commerces decision not to use the narrowly drawn Indian tariff category values for lacquer opting instead to use the broader Pakistani tariff category values. Commerce readily admits that the Indian tariff category is more narrowly tailored to the lacquer used in the pencil production but the Indian values for ferrules, erasers and lacquer were "aberrational by any measure." *Id.* at 56. Commerce also determined that the volume represented by the Indian values were less than a third of the volume of the Pakistani values bringing into question the reliability of the Indian data. The Court has found that comparison of surrogate data with U.S. data is within "Commerce's statutory authority and consistent with past practice." *Olympia Industrial, Inc. v. United States*, 21 CIT ____, ____, Slip Op. 97–44 at 12 (April 10, 1997).

With respect to Commerce's decision to use Pakistani values over Indian values, the Court finds that the plaintiffs are assailing the correctness of the result, not Commerce's methodology, which is outside the Court's standard of review. The Court abstains from determining which surrogate value is correct. It is clear to the Court that Commerce's methodology in obtaining and utilizing Pakistani values for these inputs was appropriate in determining the primary objective of calculating the most accurate dumping margins.

Plaintiffs cite *Sigma Corp. v. United States*, 19 CIT ____, 888 F. Supp. 159 (1995) *("Sigma I")*, for the proposition that "it is improper to use tariff items covering inappropriate surrogate materials in lieu of another tariff item that covers the appropriate surrogate material." Plts.' Reply Br. at 47. However, in *Sigma I* Commerce used a basket category that did not include the input in question. As the Court stated:

> In relying upon this data, Commerce failed to properly consider whether using both categories was reasonably reflective of the price of pig iron used to manufacture castings in the PRC.

Sigma Corp. v. United States, 19 CIT ____, ____, 888 F. Supp. 159, 162 (1995). In contrast, in the instant case Commerce used a basket category that most certainly included the subject merchandise, albeit with a number of other products. In the instant case, plaintiffs made no showing that the Pakistani tariff category did not include the subject inputs. Although the Pakistani data was more broad, Commerce determined that the Indian values were aberrational and unreliable based on substantial evidence in the record. The *Sigma II* court specifically validated this approach when it found that "such variations are accounted for by the averaging inherent in the prices reflected in import statistics." *Sigma Corp. v. United States*, 19 CIT ____, ____, 890 F. Supp. 1077, 1083 (1995) *("Sigma II")*.

There is ample evidence in the record to support Commerce's conclusion that the Indian values were aberrational and unreliable. The Court affirms Commerce's decision to base ferrule, eraser and lacquer values on Pakistani data.

II. Import Tariffs

Commerce excluded the amount of Indian, Pakistani and Indonesian import tariffs from the respective surrogate input values based on the fact that the tariffs would have been rebated upon exportation of the finished product to the United States. *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cased Pencils From the People's Republic of China*, 59 Fed. Reg. 55,625, 55,634 (1994). Commerce explained that its "purpose in employing its factors of production methodology is to value the merchandise as produced in the NME for export to the United States." Def.'s Br. at 12 (citing *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cased Pencils From the People's Republic of China*, 59 Fed. Reg. 55,625, 55,634 (1994)). Plaintiffs claim that the statute requires Commerce to determine "the surrogate cost of **producing** the merchandise, and does not permit the

deductions relating to post-exportation events from that cost." Plts.' Reply Br. at 50 (emphasis original).

The Court finds that import duties that are subsequently rebated are properly excluded from surrogate values used to calculate FMV. Plaintiffs contend that the plain reading of the antidumping statute effectively precludes Commerce from altering the calculation of FMV once the subject merchandise is physically produced. Plts.' Reply Br. at 49. The statute reads:

> the administering authority shall determine the foreign market value of the merchandise on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses, as required by subsection (e) of this section.
>
> (e) Constructed value
>
> (1) Determination
>
> For the purposes of this subtitle, the constructed value of imported merchandise shall be the sum of—
>
> (A) the cost of materials (exclusive of any internal tax applicable in the country of exportation directly to such material or their disposition, but remitted or refunded upon the exportation of the article in the production of which such materials are used) and of fabrication or other processing of any kind employed in producing such or similar merchandise, at a time preceding the date of exportation of the merchandise under consideration which would ordinarily permit the production of that particular merchandise in the ordinary course of business;
>
> * * *

19 U.S.C. § 1677(b)(c)(1)(e) (1988). The Court finds that plaintiffs arguments are misplaced for two reasons. First, the statute contemplates all costs up and until exportation which would include any duty drawbacks or refunds on inputs remitted before physical exportation. Second, the statute specifically speaks to the exclusion of the internal taxes that are refunded in the calculation of constructed value. The Court finds that the same rule applies to surrogate values obtained of inputs when calculating constructed value and FMV.

The Court has previously addressed this very issue. In all of the countries where surrogate values were utilized, there was a duty drawback system in effect that exempted or reimbursed exporters the payment of import duties. In *Sigma I,* the Court found that import duties that were subsequently rebated were properly deducted from the surrogate value. The Court stated that Commerce

> properly did not include costs for customs duties and other add-ons because, with regard to duties and indirect taxes, India operates a duty draw back system that rebates the amount of duties paid on input materials when the finished product is re-exported. Because Commerce is seeking to obtain a surrogate value for the finished product as exported, Commerce properly presumed that any duties

and indirect taxes collected upon importation into India are rebated upon exportation of the finished product.

Sigma Corp. v. United States, 19 CIT ___, ___, 888 F. Supp. 159, 162 (1995). The Court finds that Commerce's exclusion of import taxes on the surrogate values utilized in its factors of production analysis is supported by substantial evidence and otherwise in accordance with law.

III. Transportation, General, Selling and Administrative Expenses

Commerce initially contacted the PRC's Ministry of Foreign Trade and Economic Cooperation ("MOFTEC") and certain identified companies requesting information on the manufacturers and exporters of pencils sold to the United States. Commerce requested that MOFTEC identify those pencil manufacturers and exporters and to forward to these identified companies Commerce's initial survey in the investigation. Commerce used its two-tiered system of assigning dumping margins, where lower margins were assigned to respondents to the survey who cooperated in the investigation and higher margins, the so-called country-wide or "all others" margin, to those companies who did not cooperate. *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cased Pencils from the People's Republic of China*, 59 Fed. Reg. 55,625, 55,630 (1994). In determining the all others dumping margin, Commerce assigns the higher of (1) the highest margin alleged in the petition, or (2) the highest calculated rate of any respondent in the investigation using the best information available ("BIA") pursuant to 19 U.S.C. § 1677e(c).

In the instant case, Commerce determined that those non-responding companies effectively did not cooperate and subsequently assigned to them the highest margin alleged in the petition. The dumping margin in the petition was calculated by plaintiffs using the statutory minimum percentage of 10 percent for sales, general and administrative ("SG&A") expenses and excluded costs associated with transportation, port handling, loading and containerization costs ("transportation expenses"). Commerce recalculated the petition dumping margin on the basis of plaintiffs' updated information submitted in May, 1994, and the surrogate value of U.S. basswood. Commerce assigned participating respondents surrogate values for both GS&A and transportation expenses in calculating their dumping margins. *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cased Pencils from the People's Republic of China*, 59 Fed. Reg. 55,625, 55,630 (1994). Plaintiffs argue that the all others rate should be reformulated using the surrogate values for GS&A and transportation expenses since Commerce substituted U.S. basswood values. Plaintiffs maintain that Commerce must uniformly apply its substitution factors in a non-arbitrary fashion.

The Court finds that Commerce's recalculation of the petition margin and its assignment as the all others rate was within the discretion

granted to Commerce under the statute. The statute requires that Commerce:

> shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available.

19 U.S.C. § 1677e(c) (1988). In determining the all others rate, Commerce is empowered with wide latitude in its calculations. Commerce is not confined to the specific procedures under 19 U.S.C. § 1677b(c) or § 1677b(e), but rather is guided by 19 U.S.C. § 1677e. The all others rate does not fall under the ambit of an accurately determinable figure. By its very nature, the all others rate is nothing more than a prognostication of constructed value from manufacturers about whom nothing is known. From the prolix of investigations and subsequent litigation, it is apparent that formulating dumping margins from manufacturers that fully comply with the investigation and supply complete questionnaires is not an exact science; formulating the all others dumping margin is another step removed from exactitude. BIA is a set of data from which Commere has the discretion to employ in calculating the all others dumping margin. It is clear that Commerce used a number of values from multiple sources, all from a proper set of possible alternatives within the range of its discretion. The Court finds that Commerce's calculation of transportation, selling, general and administrative expenses is supported by substantial evidence and is otherwise in accordance with law.

IV. Separate Rates

In the Final Determination, Commerce assigned separate rates to the four participating exporters that requested them; SFTC, Guangdong, China First and Lansheng. *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cased Pencils from the People's Republic of China*, 59 Fed. Reg. 55,625, 55,626 (1994). Commerce employed its standard practice to determine "whether the exporter through whom the producer's merchandise is sold [in] the United States has an export license or, instead, restricted in its export activity, in making its determination of entitlement to separate antidumping duty rates." Def.'s Br. at 81 (emphasis omitted). Plaintifs argue that Commerce erred by not considering whether the export restrictions imposed by the PRC government "constituted for those exporters that had been granted export privileges the manipulation of prices or other interference with their business with the United States, * * *" Plts.' Reply Br. at 61 (emphasis omitted).

The Court finds that Commerce properly assigned separate dumping margins for the four requesting compliant exporters. Commerce has instituted an elaborate methodology to determine whether governmental restrictions control exporting companies. To determine whether there

is an absence of legal, or *de jure*, governmental control, Commerce looks to three elements:

> (1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses
> (2) any legislative enactments decentralizing control of companies
> (3) any other formal measures by the government decentralizing control of companies

Tianjin Machinery Import & Export Corp. v. United States, 16 CIT 931, 935, 806 F. Supp. 1008, 1014 (1992) (affirming Commerce's practice in *Sparklers from the People's Republic of China*, 56 Fed. Reg. 20,588, 20,589 (1991)). In determining the absence of factual, or *de facto*, government control, Commerce examines:

> (1) whether each exporter sets its own export prices independently of the government and other exporters
> (2) whether each exporter can keep the proceeds from its sales

Id. The Court accepts Commerce's approach of determining government control, both *de jure* and *de facto*, as a proper administration of the antidumping statute.[3] Commerce found that the four exporters satisfied all of the tests for absence of governmental control in exhaustive detail. *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cased Pencils from the People's Republic of China*, 59 Fed. Reg. 55,625, 55,626–29 (1994). The Court finds that Commerce's methodology was proper and provided substantial evidence on the record to support the conclusion that the four exporters were entitled to separate dumping margins.

Plaintiffs claim that the standard for separate rate entitlement is whether central or subcentral governments have manipulated export prices or interfered with other aspects of conducting business in the United States. Plts.' Reply Br. at 60 (citing *Silicon Carbide from the People's Republic of China*, 59 Fed. Reg. 22585, 22588 (1994)).[4] The Court finds that the two-part standard that Commerce employed in its investigation is considerably more comprehensive than the standard that plaintiffs advocate. Commerce's rigorous treatment of the issue satisfies any standard for separate rate entitlement. Plaintiffs provided no evidence that there indeed was any governmental interference with prices or other aspects of conducting business in the United States; plaintiffs merely contend that Commerce did not follow their previous methodology. Plaintiffs' unsupported argument falls well short of evidence needed to disturb Commerce's sweeping examination of governmental control. The Court finds that Commerce's thorough

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[3] The Court has previously affirmed Commerce's *de jure* and *de facto* governmental control tests in *Tianjin Machinery Import & Export Corp. v. United States*, 16 CIT 931, 935, 806 F. Supp. 1008, 1014 (1992) and in *Sigma Corp. v. United States*, 17 CIT 1288, 1302, 841 F. Supp. 1255, 1266 (1993).

[4] "There is no evidence that these governments (1) can manipulate export prices or (2) interfere with other aspects of conducting business with the United States. Therefore, we determine that IMI/E, QL/E, and SGW are not subject to government control of their silicon carbide exports." *Silicon Carbide from the People's Republic of China*, 59 Fed. Reg. 22585, 22588 (1994).

examination following their approved methodology is supported by substantial evidence on the record and otherwise in accordance with law.

V. Remand Determination

Pursuant to the remand by the Court, Commerce formulated a valuation methodology for pencil wood input and subsequently calculated prices for the surrogate value. Commerce was required to locate pricing for U.S. basswood that most closely matched the lindenwood used in the production of pencils in the PRC. Pencils are manufactured using the raw input of sawn wood or logs which are cut to produce slats which are further shaped to produce the wood component of pencils. Commerce calculated the surrogate value of basswood slats, used as an input by China First, and basswood logs, used for an input by Three Star and Anhui. Commerce then determined that the best information available on U.S. basswood was publicly available published information ("PAPI") found in *Sawlog Bulletin*, for log prices, and *Hardwood Weekly Review*, for wood slat prices. The Court finds that Commerce's conclusions set forth in the Remand Determination are supported by substantial evidence on the record and otherwise in accordance with law.

A. WOOD SLAT VALUATION

On remand, Commerce determined the surrogate value for wood slats used by China First to produce pencils. Plaintiffs and intervenors argue that Commerce's Remand Determination concerning slat valuation was flawed for four reasons: (1) selection of the proper grade of U.S. basswood; (2) selection of 4/4 inch basswood lumber; (3) selection of a percentage loss rate in the making of slats; and (4) adjustment for labor used in producing slats. The Court finds that Commerce's Remand Determination with respect to slat valuation was supported by substantial evidence on the record and otherwise in accordance with law.

Commerce determined that China First used slats that corresponded to Grades 1, 2, and 3. In an effort to accurately ascertain surrogate values for each grade, Commerce concluded that "sawn basswood grades Select/Better, #1 Common, and #2 Common corresponded to Grades 1, 2 and 3 described in the Chinese Broadleaves Standard." Def.'s Br. at 107. Commerce proceeded to value slats using an average price for Select/Better #1 Common and #2 Common sawn basswood grades in "proportion corresponding to the distribution of the slat type actually used * * *." *Id.* Intervenors contend that Commerce did not verify the quality of the slats that China First used in the production of pencils. Def.-Intervenors' Br. at 21. Intervenors maintain that "Commerce should be required to conduct a supplemental verification of China First's actual slat grade usage." *Id.* The Court finds that Commerce properly determined the slat grade since the Remand Determination focused on new information provided by intervenors and compared it to the verified information already on the record. Intervenors were unable to support their claim that the information that they provided for the Remand Determination was more accurate than their previously submitted and verified information. Remand Determination at 9–10.

Plaintiffs contested Commerce's use of 4/4 inch thickness basswood slat values stating that Commerce should have used 12/4 (three inch) thickness instead. Plts.' Reply Br. at 64. Plaintiffs asserts that 4/4 thickness wood cannot be used to make a pencil slat. China First actually purchased slats measuring 1/4 inch thick and Commerce determined that 4/4 inch thick basswood slats were the closest surrogate. Remand Determination at 11. The Court finds that Commerce's use of the 4/4 inch basswood value furthers the objective of determining the most accurate and reliable surrogate.

In processing wood to make pencils, there is a certain amount of loss from drying and cutting the raw material, green/air dried basswood sawn lumber. Commerce determined that the most accurate loss rate was provided by China First in its verified response in creating pencils from wood slats. Plaintiffs provided a loss rate of 27%, based on the actual loss rate of 12/4 thickness sawn lumber which is significantly higher than the loss rate Commerce used. Plaintiffs contend that a higher loss rate should be used since loss is inversely related to sawn lumber thickness. Intervenors argue that no loss rate should apply since China First records no loss in producing pencil slats from wood slats. The Court finds that Commerce properly determined the loss rate based on the evidence on the record.

Commerce did not include a separate labor figure in determining the surrogate slat values. Commerce stated that the labor required to process sawn lumber into wood slats was incorporated into the surrogate prices that were utilized in the Remand Determination. Plaintiffs argue that Commerce erred by presuming that sawn lumber and wood slats are identical. Plts.' Reply Br. at 69. The Court finds that Commerce properly considered the labor costs in the production of wood slats based upon the surrogate values that Commerce employed in the Remand Determination from the record evidence. The Court finds that Commerce's determination of the surrogate value for slats was supported by substantial evidence on the record and otherwise in accordance with law.

B. Log Valuation

Commerce calculated the surrogate value of logs used by Anhui and Three Star on remand. Plaintiffs contend that Commerce's Remand Determination was flawed for three reasons: (1) Commerce's use of PAPI to value logs; (2) Commerce's treatment of the weight of green basswood logs; and (3) Commerce's selection of the width of logs and other price discrepancies. The Court finds that Commerce's Remand Determination regarding the valuation of logs was based on substantial evidence and otherwise in accordance with law.

Plaintiffs contend that Commerce neglected to use the most accurate pricing for basswood logs contained in a study prepared by an expert for plaintiffs. Plts.' Br. at 70. Commerce used prices from a public trade journal instead, following previous practice. The Court finds that the use of PAPI serves two purposes: first, it provides accurate information accepted by the market and second, it represents a reliable source insu-

lated from conflicts of interest. Plaintiffs' submitted information lacks the inherent reliability that PAPI provides. The Court finds that Commerce's reliance on PAPI is a reasonable means of determining surrogate values, fostering both policy aims of finding the best information available and calculating the most accurate dumping margins.

Commerce valued basswood logs using the equation of one cubic meter equals 490 kg. representing a verified questionnaire response from the PRC pencil producers. Def.'s Br. at 98. Plaintiffs maintain that Anhui and Three Star purchased green wood as a raw material input and the correct weight of green basswood logs is 913 kg. and the 490 kg. figure applies to basswood in the dried state. Plts.' Reply Br. at 74. However, the evidence does not establish that the 490 kg. figure is for dried basswood. The Court finds that the record evidence supports Commerce's use of the 490 kg. figure since it is a verified raw material input.

Commerce valued basswood logs based on PAPI from an industry journal and from consultations with five U.S. lumber mills. Def.'s Br. at 103. Plaintiffs argue that Commerce's valuation did not include all logs of the proper width as reported and the valuation omitted reported log prices that were aberrationally low. Plts.' Reply Br. at 75–76. The Court finds that Commerce went to great lengths in calculating the value of basswood logs. Commerce was within their statutory discretion to include and exclude log prices that were considered to be inside or outside of the scope of the surrogate value calculation.

Finally, Commerce calculated the all others rate based on the plaintiffs' petition readjusted to account for wood valuation data obtained in the remand proceedings. Plaintiffs argue that the calculation of the all others rate should include the 27% loss rate incurred in lumber to slat manufacturing. *Id.* at 76. As the Court has stated, the all others rate does not fall under the ambit of an accurately determinable figure. By its very nature, the all others rate is nothing more than a prognostication of constructed value from manufacturers about whom nothing is known. BIA is a set of data from which Commere has the discretion to employ in calculating the all others dumping margin. Therefore, the Court finds that Commerce's valuation of logs was based on substantial evidence and otherwise in accordance with law.

CONCLUSION

For the foregoing reasons, the Court affirms Commerce's Remand Determination in all respects.

PUBLIC VERSION

(Slip Op. 97–152)

AK STEEL CORP., BETHLEHEM STEEL CORP., INLAND STEEL CO., INC., LTV STEEL CO., INC., AND U.S. STEEL GROUP A UNIT OF USX CORP. PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND DOFASCO, INC., SOREVCO, INC., STELCO, INC., AND CONTINUOUS COLOUR COAT, LTD., DEFENDANT-INTERVENORS

Court No. 96–05–01312

[ITA antidumping duty determination remanded.]

(Dated November 14, 1997)

Skadden, Arps, Slate, Meagher & Flom LLP (Ellen Schneider, James Hecht, Robert E. Lighthizer, and *John J. Mangan)* for plaintiffs.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Velta A. Melnbrencis) Stacy J. Ettinger, Karen L. Bland,* and *Robert J. Heilferty,* Attorneys, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendants.

Rogers & Wells (William Silverman, Douglas J. Heffner, Stephen J. Claeys, and *Richard P. Ferrin)* for defendant-intervenor Dofasco, Inc.

Willkie Farr & Gallagher (Daniel L. Porter, Christopher Dunn, and *Jacqueline A. Weisman)* for defendant-intervenors Continuous Colour Coat, Ltd. and Stelco, Inc.

OPINION

RESTANI, *Judge:* This matter is before the court on a Motion for Judgment on the Agency Record pursuant to USCIT R. 56.2 by plaintiffs, AK Steel Corporation, Bethlehem Steel Corporation, Inland Steel Company, Inc., LTV Steel Company, Inc., and U.S. Steel Group, a unit of USX Corporation (collectively "plaintiffs"); against defendant, United States Department of Commerce ("Commerce"), and defendant-intervenors, Continuous Colour Coat, Ltd. ("CCC"), Dofasco, Inc. ("Dofasco"), Sorevco, Inc. ("Sorevco"), and Stelco, Inc. ("Stelco"). Plaintiffs are domestic producers of corrosion-resistant carbon steel flat products. Under review are the final results of an administrative review. *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada,* 61 Fed. Reg. 13,815 (Dep't Commerce 1996) (final results of admin. review) [hereinafter *"Final Results"].*

Plaintiffs contend that: (1) Commerce's acceptance of Dofasco's cost methodology is unsupported by substantial evidence on the agency record and is not in accordance with law; (2) Commerce improperly included a revision by Dofasco to an expenditure from a prior period as an element of cost in the current review; (3) Commerce erred in its treatment of excess prime merchandise in its model-match exercise for which Stelco failed to report complete product characteristics; (4) Commerce's decision to accept Stelco's adjustments to prices is unsupported by substantial evidence on the agency record and is not in accordance with law;

(5) the court should remand for the correction of ministerial errors in Commerce's final results for Stelco; and (6) Commerce erred in accepting CCC's improperly allocated price adjustments.

In response, Commerce argues that all of its challenged determinations were supported by the agency record and in accordance with the law. Commerce also requests a remand to correct ministerial errors contained in the final margin calculation for Stelco. This request is granted.

BACKGROUND

In August 1993, Commerce issued an antidumping duty order covering corrosion-resistant carbon steel flat products from Canada. *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada*, 58 Fed. Reg. 44,162, 44,162 (Dep't Commerce 1993)(antidumping duty orders). In August 1994, Canadian producers of the subject merchandise filed a request for administrative review of Commerce's antidumping order. *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada*, 60 Fed. Reg. 42,511, 42,511 (Dep't Commerce 1995)(prelim. results). The period of review ("POR") was from February 1993 through July 1994. *Id.* In August 1995, Commerce published the preliminary results of the administrative review.[1] *Id.* In March 1996, Commerce published its final results of the administrative review. *Final Results*, 61 Fed. Reg. at 13,815. Plaintiffs raised the following challenges to Commerce's determination below and now again on appeal.

1. *Dofasco:*

Plaintiffs challenged Dofasco's order-specific cost methodology for determining cost of production ("COP") and constructed value ("CV"). Plaintiffs argued that Dofasco calculated COP on the basis of home market sales only and CV on the basis of U.S. sales only. Commerce rejected plaintiffs' argument noting that its acceptance of Dofasco's COP and CV data is proper because Dofasco's calculations are based upon a weighted-average production basis for the costs incurred to produce the subject merchandise. Furthermore, Commerce found that Dofasco's cost methodology complies with both the law and Commerce's questionnaire. For these reasons, Commerce determined that application of best information available ("BIA") was inappropriate.

Plaintiffs also challenged Commerce's acceptance of Dofasco's partial reversal of restructuring charges taken in a prior period. Plaintiffs argued that Commerce has consistently held that costs relating to a prior period, and the credit associated with them, have no logical relation to production costs of the subject merchandise during a later period. Commerce argued that the inclusion of disputed cost figures was consistent with Commerce policy.

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[1] Pre-Uruguay Round Agreements Act ("URAA") law applies to this administrative review. Amendments to United States antidumping statute and regulation pursuant to the URAA are inapplicable to administrative reviews initiated prior to January 1, 1995. *Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995).

2. *Stelco:*

Plaintiffs argued that Commerce's model-match methodology when applied to Stelco's sales of excess prime merchandise reported with missing physical characteristics was not in accordance with law or supported by substantial evidence on the record. Plaintiffs made two arguments in support of their challenge: (1) Commerce must match sales based on actual physical characteristics of the products and may not match products with different missing physical characteristics; and (2) as a result of Stelco's inability to provide Commerce with adequate information, Commerce is required to apply BIA.

Commerce rejected plaintiffs' challenge asserting its broad discretion to determine what merchandise is categorized as "such or similar." Commerce also verified Stelco's data and argues that the sales of the merchandise missing physical characteristics were minimal and therefore harmless. Finally, Commerce rejected the use of BIA arguing that where the respondent cooperated and provided all the information requested, the use of BIA is inappropriate. *Final Results*, 61 Fed. Reg. at 13,830–31.

Plaintiffs also challenged Stelco's reported gross unit prices in Canadian and American markets. Plaintiffs argue that Stelco's price adjustments were made to gross unit prices directly and were not separately reported as required. Furthermore, plaintiffs alleged the price adjustments were not transaction-specific, but instead are impermissibly spread across multiple sales referenced on a particular credit or debit memo.

Commerce rejected plaintiffs' challenge arguing that it appropriately verified Stelco's data, that separate reporting was not required, and that Stelco properly adjusted prices for debit and credit notes.

3. *Continuous Colour Coat:*

Finally, plaintiffs argued that Commerce erred by accepting CCC's adjustments to prices of the subject merchandise through credit notes or debit notes that were issued after invoicing of the merchandise and that were allocated over multiple sales. They asserted that Commerce should have used BIA when the adjustments were not matched to a specific sale. Commerce, however, found that the debits and credits were transaction-specific and allowed them as a direct price adjustment.

Standard of Review

The court will uphold the final results of an antidumping duty administrative review unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i)(1994). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). "'[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" *Magnesium Corp. of Am. v. United*

States, 938 F. Supp. 885, 889 (Ct. Int'l Trade 1996)(quoting *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966)).

DISCUSSION

I. *Dofasco:*

A. *Cost Methodology:*

When calculating antidumping duties, Commerce must determine whether home market sales were made at less than the cost of production ("COP"). 19 U.S.C. § 1677b(b) (1988). Commerce is, in certain circumstances, also required to disregard such sales in determining foreign market value. *Id.* When Commerce disregards such below-cost sales and determines the remaining home market sales "to be inadequate as a basis for the determination of foreign market value," the statute requires Commerce to use constructed value ("CV") of the merchandise to determine its foreign market value. *Id.*

Both COP and CV include a determination of the cost of manufacture ("COM") for the product. COM is the total material and fabrication cost incurred in producing "such or similar merchandise" during the period of review. 19 U.S.C. § 1677b(e)(1) (calculation of CV); 19 C.F.R. § 353.51(c)(1994) (calculation of COP). The statute defines "such or similar merchandise" as:

> [t]he merchandise which is the subject of an investigation and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.

19 U.S.C. § 1677(16)(A)(1988).

Plaintiffs challenge three aspects of Dofasco's methodology used in calculating the cost of manufacture. First, plaintiffs claim that Dofasco did not calculate its weighted-average costs per product using its entire production volume, but rather used only production for home market sales to determine the COM for COP, and only production for U.S. sales to determine the COM for CV. Second, by using quarterly-averaged prices for raw materials the costs were distorted as they were dependent on when the merchandise was produced. Third, plaintiffs claim that Dofasco misled Commerce in its responses concerning its methodology and thus Commerce should have applied BIA.

1. *Methodology:*

Plaintiffs argue that Commerce's acceptance of Dofasco's methodology was not in accordance with law because the methodology limited the COM for cost of production and constructed value calculations according to the product's destination. Commerce's interpretation of the statutory requirements identifying the product for which the respondent must supply cost information (i.e., the product for COP is the product sold in the home market; the product for CV is the product sold in U.S.) are not contested. Instead, plaintiffs challenge the interpretation of the statutory provisions identifying how COM for a product must be determined once the product is identified. Plaintiffs assert that both the stat-

ute and regulations expressly provide that *all* costs to produce identical merchandise, irrespective of the destination of the completed product, must be included in the weighted-average COP and CV calculations.

To support their position, plaintiffs suggest that this rule was articulated by Commerce in *Certain Circular Welded Carbon Steel Pipes and Tubes from the Republic of Korea*, 49 Fed. Reg. 9926 (Dep't Commerce 1984)(final determ.)[hereinafter *"Steel Pipes from Korea"].* In *Steel Pipes from Korea*, the producer of coil used to produce the merchandise under investigation maintained a two-tier pricing system in which coil for eventual domestic consumption was sold at higher prices than the coil for export. *Id.* at 9927. Respondents in that case argued that the cost of producing the merchandise under investigation must be calculated only on the basis of the higher coil costs incurred in producing merchandise for domestic consumption. *Id.* Commerce disagreed with respondents stating that "where there are different costs associated with producing merchandise produced for export as compared with merchandise produced for domestic sale and the merchandise is physically identical, we have used the average cost of producing that merchandise in calculating cost of production or constructed value." *Id.* at 9928. Commerce further noted that section 1677b(e) of Title 19 states that "the constructed value of imported merchandise" is "the cost of materials * * * and of fabrication or other processing of any kind employed in producing such or similar merchandise." 19 U.S.C. § 1677b(e)(1). Thus, plaintiffs allege that the CV of the merchandise sold in the U.S. includes *all* costs to the company to produce that product, regardless of where it is ultimately sold.[2]

The court finds this argument unpersuasive for the following reasons. First, *Steel Pipes from Korea* does not explicitly stand for the rule suggested above. *See* 49 Fed. Reg. at 9928. Instead, it merely states that in a situation with a two-tiered price system for the raw materials used in the merchandise under investigation, Commerce will use the average cost of producing that merchandise. *Id.* This case does not involve a two-tiered pricing system for raw materials.

Second, the statute does not expressly resolve this issue as plaintiffs contend. It addresses only the issue of identifying the relevant product for CV and COP, but does not address the method by which Commerce must calculate the COM in either situation. Thus, neither plaintiffs nor Dofasco state a plain meaning of the statute which resolves the issue at hand.

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[2] Dofasco offers an alternative statutory interpretation. Dofasco relies upon section 1677b(b) of Title 19 which states:

> [if Commerce] has reasonable grounds to believe or suspect that *sales in the home market* of the country of exportation * * * have been made at prices which represent less than the cost of producing *the merchandise in question*, it shall determine whether, in fact, such sales were made at less than the cost of producing *the merchandise*.

19 U.S.C. § 1677b(b)(emphasis added). Dofasco argues that the "merchandise in question" relates to the "sales in the home market." Thus, when referring to the cost of producing "the merchandise," the statute plainly means the merchandise in question sold in the home market. Dofasco raises a similar argument for calculating CV. The "merchandise" in 19 U.S.C. § 1677b(a)(2) is said to refer to the "imported merchandise" or the merchandise sold in the U.S. and thus CV is allegedly based on the COM of the merchandise sold in the United States.

The court is thus confronted with the classic situation where a statute does not expressly address the issue before the court. Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984), the court must defer to an agency's reasonable interpretation of the statute if the court finds Congress "has not directly addressed the precise question at issue." *Id.* at 843. The question for the court now is whether Commerce's application of 19 U.S.C. § 1677b reflects a permissible construction of the statute. *See id.*

Here, Commerce accepted Dofasco's methodology that first calculated a per unit production cost based on total production irrespective of the intended market and then calculated a weighted-average of all products by control number, which reflected production for sale in a particular market. *Final Results*, 61 Fed. Reg. at 13,824. Commerce's acceptance of Dofasco's methodology essentially finds a middle ground. Total production costs are incorporated into the COM, but final COP and CV are determined based on a weighted-average reflecting production for a particular market. The statute does not dictate a different result.

Although Dofasco's methodology, based on its particular method of record keeping, is not a usual method, substantial evidence on the record shows that Commerce considered and understood the mechanics of the methodology before accepting the methodology as a reasonable approach under the statute. Contrary to plaintiffs' claim, Dofasco sufficiently disclosed its methodology to Commerce before verification thereby giving Commerce the opportunity to understand the mechanics of the methodology and conclude that it was reasonable before applying it. *See* Dofasco's Section VI Response (Mar. 6, 1995), at 26–27, P.R. Doc. 312, Pls.' App., Tab 10; Dofasco's Section VI Supplemental Response (Mar. 31, 1995), at 2, C.R. Doc. 162, Dofasco's App., Tab 10.

The record compiled by Commerce provides a clear description of Dofasco's methodology. When verifying Dofasco's reported costs, Commerce reported that the accounting system calculates product cost per unit based on total production costs. Dofasco's Section VI Response (Mar. 6, 1995), at 1, 9–13, P.R. Doc. 312, Def.'s App., Ex. 11. The system then identifies the specific cost centers through which each individual sales order was processed. Dofasco Cost Verification Exhibit No. 18 (May 12, 1995), C.R. Doc. 200, Pls.' App., Tab 25. Thus, to calculate cost for COP and CV, Dofasco calculated the total cost for a specific product and then divided that amount by the total production of that product.[3] *See* Cost Verification Exhibit No. 21 (Apr. 18, 1995), C.R. Doc. 200, Dofasco's App., Tab 5; Cost Verification Exhibit No. 22 (Apr. 18, 1995), C.R.

[3] Commerce verified Dofasco's reported COP and CV figures. Commerce verified that the information contained in Dofasco's sales orders used in conjunction with its quarterly grade cost table, allowed Dofasco to calculate precise production costs for any product. Dofasco's Cost Verification Report (May 12, 1995), at 3, P.R. Doc. 417, Def.'s App., Ex. 13. Commerce noted that the production costs were based upon the known physical and chemical properties of the material produced, the line time each production stage required on a unit basis, the yield factor of each production process, and the beginning and ending weight of the material at each stage of the production process. *Id.* Commerce also noted that the grade cost table for slabs was a collection of costs which Dofasco updated on a quarterly basis to reflect the costs of producing slabs based upon raw material costs, processing cost, and overhead. *Id.*

Doc. 200, Dofasco's App., Tab 6. Finally, Commerce verified that Dofasco in its second step, appropriately calculated a weighted-average cost for each control number. *See* Dofasco's Cost Verification Report (May 12, 1995), at 4, P.R. Doc. 417, Def.'s App., Ex. 13; Dofasco's Cost Verification Ex. No. 16, C.R. Doc. 417, Def.'s Confid. App., Ex. 7; Dofasco's Section VI Response, at 2, 30, P.R. Doc. 312, Def.'s App., Ex. 11; Dofasco's Section VI Supplemental Response, at 2, Dofasco's App., Tab 10.

2. *Distortion:*

Plaintiffs argue that as the rate for each component was revised based on the costs incurred and the volume produced during a specific quarter, the production costs varied depending on when it was produced during the POR. Plaintiffs also argue that because the order specific costs would not necessarily be the same for identical products, it was important to include the costs for all production orders of a product in the weighted-average calculation. Thus, plaintiffs conclude that the omission of relevant production orders from the weighted-average calculation resulted in distorted costs, because the COM for identical products should have been the same. This distortion, plaintiffs argue, creates a loophole through which Dofasco is able to deflate its production costs and distort the margin calculation.

Specifically, plaintiffs argue that Dofasco's quarterly averaging of prices results in differing COMs for merchandise found in the same CONNUM.[4] Plaintiffs further argue that for those CONNUMs where merchandise was sold in both markets, the resulting COMs are incorrect because the costs of United States and third country production orders were omitted from COP and the costs of Canadian and third country production orders were omitted from CV.[5]

Upon review of the record, the court finds two problems with plaintiffs' argument. First, the fact that Dofasco weight-averaged sales within a CONNUM based upon the relative production volume of home market or U.S. sales does not mean, as plaintiffs argue, that Dofasco omitted relevant costs. As described above, the COM for each product within a CONNUM was based upon the entire production volume of that product. Furthermore, differing costs of manufacture for COP and CV indicate that the sales to each market have been appropriately matched with their costs. Plaintiffs do not argue that the methodology is specifically designed to mask artificially raised or lowered costs, as in a two-tiered pricing system. Instead, as plaintiffs note themselves, the "distortion" occurs in part because of the use of quarterly costs reports.

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[4] "CONNUM" is the computer field name assigned to each unique product or each grouping of products sold that is considered identical for product matching purposes.

[5] Plaintiffs cite to examples in the record to support their argument that costs for merchandise considered identical should not have differing COMs. In CONNUM 0101, plaintiffs argue that Dofasco's methodology resulted in one COM for COP, C$[ ]/cwt. and a different COM for CV, C$[ ]/cwt., a difference of [ ] percent. Petitioners' Case Brief for Dofasco (Sept. 15, 1995), at 5, C.R. Doc. 228, Pls.' App., Tab 26 (citing Dofasco's May 5, 1995 cost computer tape). In CONNUM 0275, plaintiffs also note that Dofasco reported a COM for COP, C$[ ]/cwt. and a different COM for CV, C$[ ]/cwt., a difference of [ ] percent. *Id.*

Second, plaintiffs fail to meet their burden of proving that Dofasco's cost methodology distorts the antidumping margin.[6] Plaintiffs argue for an alternative method that would prohibit the use of quarterly averaged prices for raw materials and require that all production orders be included when calculating COP and CV. The existence of an alternative method may not in itself demonstrate the lack of reasonableness in Dofasco's accounting method. *See Federal-Mogul Corp. v. United States*, 63 F.3d 1572, 1579–80 (Fed. Cir. 1995) (according considerable deference if application requires agency's expertise); *Hyster Co. v. United States*, 18 CIT 119, 122, 848 F. Supp. 178, 182 (1994)(Commerce's determination need not be the one the court views as the most reasonable). Ordinarily, quarterly averaging of prices would not manifest a substantial distortion in cost data requiring a reversal of Commerce's decision. Quarterly averaging of prices may pose a concern if it were shown that Dofasco chose the quarter in which it would produce all merchandise exported to the United States for that year, another quarter specifically designated as the "home market quarter," and yet another specifically designated as a "third country quarter." In such a situation Dofasco would be able to hide costs and circumvent antidumping law. There is, however, no indication of a deliberate scheme by Dofasco to manipulate manufacturing and take advantage of such a loophole.

The court will not reject Dofasco's methodology as Commerce's decision to accept Dofasco's methodology was a reasonable means of effectuating the statutory purpose and is supported by substantial evidence in the record.

3. *Best Information Available:*

Finally, plaintiffs argue that Dofasco has impeded Commerce's investigation and, therefore, Commerce must reject the reported costs and apply adverse BIA. *See* 19 U.S.C. § 1677e (c)(1988); 19 C.F.R. § 353.37(a)(1)(1994). Plaintiffs argue that Dofasco impeded the course of the investigation (1) by failing to timely disclose the nature of the cost methodology and deliberately mischaracterizing the methodology to Commerce and (2) by insuring that Commerce was unable to correct the subsequent distortions.

Specifically, plaintiffs find inadequate Dofasco's March 1996 response to Commerce's antidumping review questionnaire where Dofasco stated "[t]he costs were calculated by determining the weighted-average cost per cwt. of all the sales invoices with the product characteristics, as defined in Appendix V of the Department's questionnaire." Dofasco's Section VI Response, at 27, P.R. Doc. 312, Pls.' App., Tab 10. Thus, plaintiffs argue that Dofasco gave Commerce no indication, prior to verification, that it had weight-averaged order-specific costs based on the destination of the merchandise.

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[6] Plaintiffs incorrectly argue that any rationale which legitimizes Dofasco's methodology because it is "more precise" is an impermissible *post hoc* rationalization and should be disregarded. Where Commerce's rationalization is described in or supported by the record, as is the case here, it is not a *post hoc* rationalization presented for the first time in briefs before the court. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962).

The court, however, finds plaintiffs' argument meritless. The record indicates that Dofasco sufficiently disclosed its cost methodology at the outset of the antidumping review. In response to Commerce's antidumping review questionnaire, Dofasco stated that "the reported COP is the fully-absorbed cost per hundred weight incurred to produce corrosion resistant products sold in the home market" and further stated that the "reported CV is the fully-absorbed cost incurred to produce corrosion resistant products sold in the United States." Dofasco's Section VI Response, at 1–2, P.R. Doc. 312, Def.'s App., Ex. 11. The court finds that juxtaposing these two phrases, Dofasco at least implied its use of a market specific methodology for weight-averaging in its COP and CV cost of manufacture calculations. Furthermore, there is no indication that Commerce investigators were surprised or were unprepared to analyze Dofasco's costs at verification.

One of the purposes of BIA is to induce the recalcitrant participant into providing Commerce with complete and accurate information in the course of an antidumping investigation. *NTN Bearing Corp. of Am. v. United States*, 17 CIT 713, 719, 826 F. Supp. 1435, 1440 (1993). Commerce has the discretion to resort to adverse BIA where it believes that the respondent, through refusal or mere inability, is not complying with the investigators. *See id.* at 720, 826 F. Supp. at 1441; *see also* 19 U.S.C. § 1677e(c). Here, however, the record plainly demonstrates both that Commerce was aware of Dofasco's methodology and that Dofasco cooperated with Commerce's review of the antidumping investigation. The court finds that Commerce's determination that Dofasco timely responded to its inquiries and in sufficient detail was reasonable and thus the application of adverse BIA is inappropriate.

B. *Dofasco's Partial Reversal of Restructuring Charges Taken in a Prior Period:*

As background, it should be observed that in calculating Dofasco's COP and CV during the earlier less than fair value ("LTFV") investigation, Commerce included as costs Dofasco's estimated multi-year expenditures related to restructuring of the corporation. *Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, Certain Corrosion-Resistant Carbon Steel Flat Products, and Certain Cut-to-Length Carbon Steel Plate from Canada*, 58 Fed. Reg. 37,099, 37,108 (Dep't Commerce 1993) (final determ.). The estimated future expenditures were considered ordinary expenses that Dofasco charged against its 1992 income. *See id.* The LTFV determination, however, is not before the court and the agency record relating thereto is not part of the record for the purposes of this action.

In this first administrative review, Dofasco reported certain partial reversals of the earlier estimated restructuring expenditures.[7] Dofasco's Section VI Response, at 7, 40–41, P.R. Doc. 311, Def.'s App., Ex. 11;

[7] In 1993, Dofasco reduced its 1992 costs by C$[ ]; in 1994, it reduced its costs by C$[ ]. Dofasco's Supplemental Section VI Response (Mar. 31, 1995), at Ex. 1, P.R. Doc. 364, Pls.' App., Tab 11.

Dofasco's Supplemental Response (Mar. 31, 1995), at Ex. 1, P.R. Doc. 364, Def.'s App., Ex. 12. These reductions were included in Dofasco's financial statements in 1993 and 1994 as a credit to costs. Dofasco's Supplemental Section VI Response (Mar. 31, 1995), at Ex. 1, P.R. Doc. 364, Pls.' App., Tab 11. In the final results of the first administrative review Commerce stated:

> In the present review, Dofasco's financial statements include certain partial reversals of those earlier restructuring estimates. In order for the Department to be consistent and abide by its long-standing policy, it must also include these partial reversals in its calculation of COP and CV for Dofasco.

Final Results, 61 Fed. Reg. at 13,825. Plaintiffs now argue that because the reversals concern costs from a prior fiscal year and do not relate to costs to produce the merchandise during the POR they should not have been included in the reported costs. The inclusion of reversals, plaintiffs argue, is also contrary to Commerce's past practice.

In defendant's memorandum in partial opposition to plaintiffs' motion for judgment on the agency record, the government requested a remand to the Department of Commerce to clarify its policy with respect to the reversal charges and to determine if the adjustments made for Dofasco were consistent with that practice and policy. The court did not grant immediate remand, but ordered the government to explain and describe the policy and past practice of the Department of Commerce.

As articulated before the court, Commerce's past practice regarding reversal of charges for a prior period has two components. As a first step, Commerce will rely upon a respondent's books and records prepared in accordance with the home country's Generally Accepted Accounting Principles ("GAAP") unless those accounting principles do not reasonably reflect the costs of producing the merchandise. *See Certain Cut-To-Length Carbon Steel Plate from Germany*, 61 Fed. Reg. 13,834, 13,837 (Dep't Commerce 1996) (final results of admin. review). This general principle is not in dispute and Commerce has found that reversals of prior period costs in a subsequent period distort costs. *Id.* Thus, even though the reversals of prior charges correctly appear on financial statements in accordance with GAAP, Commerce has not relied on the respondent's books in such a situation.

Commerce reached the same conclusion in *Small Diameter Circular Seamless Carbon and Alloy Steel, Standard, Line and Pressure Pipe from Italy*, 60 Fed. Reg. 31,981, 31,991 (Dep't Commerce 1995) (final determ.) [hereinafter *"Steel Pipe from Italy"]* where petitioners challenged respondent's decision to include in its reported costs reversals that were recorded during the period of investigation ("POI"), but that related to operating expense accruals and write-downs of equipment

and inventory from a period predating the POI.[8] Commerce held that such reversals should not be included in the reported costs:

> We do not consider it appropriate to reduce the current year production costs by the reversal of prior year operating expense accruals and write-downs of equipment and inventory. *The subsequent year's reversal of these estimated costs does not represent revenue or reduced operating costs in the year of reversal*. Rather, they represent a correction of an estimate which was made in a prior year.

Steel Pipe from Italy, 60 Fed. Reg. at 31,991 (citation omitted) (emphasis added). Commerce noted that reducing a subsequent year's costs because of the reversal in that year of a prior year's estimate would mean "distorting the actual production costs incurred in a subsequent year." *Id.* Commerce did not expressly conclude, as defendant appears to argue, that the distortion would only occur when the expense was incurred prior to any Commerce investigation and the reversal occurred during the POI. Instead, Commerce noted that the adjustment should occur in the same period as the accrual. Specifically, Commerce stated:

> If the Department is able to verify that an operating expense accrual or an equipment or inventory write-down recorded during the POI is subsequently adjusted because the company overestimated the cost, we will use the corrected figure, but only for the same period in which the accrual or write-down occurred.

Id.

The past practice described above is consistent with Commerce's matching principle for cost analysis in LTFV investigations and periodic reviews. The matching principle states that an expense should be recorded in the period in which the product makes its contribution to revenue with the intent to ensure that expenses and revenues are recorded in the proper period. Donald E. Kieso & Jerry J. Weygandt, *Intermediate Accounting* 46 (8th ed. 1995)(attached to Def.'s Response to Court Order, at Ex. 1). Applied to Commerce's cost analysis, the matching principle implies that "any adjustment (such as reversals) recorded in an accounting period that relates to an expense incurred and accrued in a prior accounting period, in fact, represents a change in the cost from that prior accounting period, rather than a cost adjustment pertaining to the current accounting period." Def.'s Response to Court Order, at 3.

Although Commerce stated unequivocally that there is "not justification for distorting actual production costs incurred in a subsequent year by reducing subsequent year costs by the overestimated amount," *Certain Cut-To-Length Steel Plate from Germany*, 61 Fed. Reg. at 13,837, the government asserts that as a second step in the analysis Commerce may recognize an exception to its general rule in a case such as this one.

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[8] Commerce reached a similar conclusion in *Certain Cut-To-Length Steel Plate from Germany*, 61 Fed. Reg. at 13,837. There, the original accrual occurred before the POI and respondent sought to include the subsequent reversal in the COM calculation. *Id.* Commerce noted that:

> [t]here is not justification for distorting actual production costs incurred in a subsequent year by reducing subsequent year costs by the overestimated amount.

Id.

It articulates the exception as follows:

> [t]he matching principle in accounting may be superseded, however, as a consequence of the conservative nature of accounting and its purpose in providing information to financial statement users. In these situations, the concept of conservatism dictates that certain expenses [such as restructuring] relating to liabilities for current and future periods be accrued in the first accounting period in which they can be reasonably estimated.

Def.'s Response to Court Order, at 4–5. Thus, the government argues that because in the LTFV investigation Commerce included, in its entirety, the amount of estimated expenditures in the COP/CV calculation and because implementation of the multi-year restructuring plan was still in progress during the review, it "was reasonable to allow Dofasco to include in its COP/CV calculation certain adjustments (reversals) to the estimated expenditures accrued in 1992." *Id.* at 6.

Defendant's explanation of why an exception to the matching principle exists and was applied here does not withstand analysis. First, conservatism does not supersede the matching principle, but rather is incorporated into it as a general quality found in all information used in financial statements. *See* 2 Financial Accounting Standards Board, *Original Pronouncements, Accounting Standards* 1041–42 (1993).

Second, accruing Dofasco's entire estimate in the first available accounting period "because of conservatism" does not lead logically to the conclusion that including partial reversals in a subsequent period is appropriate because they would relate to the costs of that period. For accounting purposes, reversals should be credited as soon as possible. If they are credited before the relevant period of review is completed there is no problem. *See Steel Pipe from Italy*, 60 Fed. Reg. at 31,991. But excessive estimates are respondent's responsibility and if they are not corrected promptly they may not be subject to correction in later antidumping proceedings.

Third, while it may not have been appropriate to include all costs for a multi-year restructuring in the LTFV investigation cost calculation, no matter what the proper result is for the LTFV investigation, it is not before the court and the cost adjustments at issue must stand on their own.

Finally, giving a credit against costs accounted for years earlier when they were estimated but not incurred may result in a double distortion. The costs may actually impact the company in the current period. As defendant noted, the restructuring is still in progress, but the costs were *deducted* instead of *added* creating the potential for a double distortion. The periodic investigation now before the court, however, sets the actual assessment rates and it must be accurate, whether or not the original *estimates* from the LTFV investigation were correct. As Commerce has recognized, whether or not financial accounting practices are generally acceptable, they must be rejected for antidumping purposes if they do not accurately reflect costs.

Commerce's past practice with regard to reversals appears reasonable. The exception now proffered is not supported by any of the arguments made by defendant. In any case, the court may not accept counsel's *post hoc* rationalizations for agency action. *Burlington Truck Lines*, 371 U.S. at 168–69. "'[A] simple but fundamental rule of administrative law * * * is * * * that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.'" *Id.* at 169 (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). Commerce in the final results stated only that it must abide by its long standing policy, but its practice was the opposite of what it did here. *See Final Results*, 61 Fed. Reg. at 13,825.

Moreover, the parties have not cited to substantial evidence on the record before Commerce that certain facts of this case warrant an exception to Commerce's past reversals practice. There also is no evidence that Commerce determined that including the reversals in the period of review COP and CV calculations did not distort costs. Accordingly, this matter is remanded to Commerce to eliminate the credit for the reversals unless it can articulate a rational reason for abandoning its past practice. Reiterating the reasons proffered in this action will be insufficient.

II. *Stelco:*

A. *Model-Match Methodology:*

Section 1677(16) of Title 19 defines "such or similar merchandise" as used in determining foreign market value ("FMV"). Pursuant to that section, Commerce must first look for the "merchandise which is the subject of an investigation and other merchandise which is identical in physical characteristics with, and was produced in the same county by the same person as, that merchandise." 19 U.S.C. § 1677(16)(A); *see also Hussey Copper, Ltd. v. United States*, 895 F. Supp. 311, 313 (Ct. Int'l Trade 1995). Only if "such" merchandise is unavailable may Commerce use the most physically similar product to the merchandise sold in the United States. 19 U.S.C. § 1677(16); *Hussey Copper*, 895 F. Supp. at 313. Finally, if Commerce uses similar merchandise in determining FMV, it must adjust for any difference between the products if such difference is wholly or partly due to physical differences. 19 C.F.R. § 353.57 (1995); *Hussey Copper*, 895 F. Supp. at 313. Commerce, however, has discretion to define what constitutes "such or similar" merchandise in each case. *See Hussey Copper*, 895 F. Supp. at 314.

In its determination of FMV, Commerce applied the following model-match methodology to Stelco's sales. Commerce identified and ranked in the order of importance eleven product characteristics.[9] Commerce's Questionnaire (Sept. 15, 1994), at App. V–6 to V–9, P.R. Doc. 20, Def.'s

[9] These characteristics were: (1) type, (2) metallic coating process, (3) clad material/coating metal, (4) quality, (5) yield strength, (6) metallic coating weight, (7) minimum thickness, (8) width, (9) form, (10) temper rolling, and (11) leveling. Commerce's Questionnaire (Sept. 15, 1994), at V–6 to V–10, P.R. Doc. 20, Def.'s App., Ex. 2.

App., Ex. 2. For reported U.S. and home market sales, the program assigned a numeric value to each designated product characteristic. *See* Corrosion Resistant Model Match Program (Feb. 7, 1996), lines 1005–1095 (home market sales), lines 1207–1300 (U.S. sales), Def.'s Conf. App., Ex. 6. The program compared each product characteristic for a particular U.S. model with the product characteristics of a particular home market model and assigned a "dif" variable to the comparison. The "dif" variable represents the difference between the numeric values assigned to each product characteristic. *See id.* at lines 1350–1424. Examining the "dif" variable for each product characteristic, *see id.* at lines 1426–29, the program found identical matches when the resulting "dif" variables for all product characteristic comparisons were zero. *Id.* at lines 1430–36. The program then identified the next most similar models based upon the examination of each resulting "dif" variable combination (i.e., the smallest "dif" variable for a comparison at a higher ranked product characteristic was considered the best match based upon physical criteria). *See id.* at lines 1438–46.

Commerce applied a variation of this methodology for Stelco's sales of excess prime merchandise reported with missing characteristics. All missing product characteristics were assigned the same generic value. When comparing a particular U.S. model with a particular home market model, if the U.S. model had a missing characteristic, the program assigned a value of zero to the comparison for that product characteristic (i.e., the resulting "dif" variable would be zero). *See generally id.* at lines 1350–1425. If the particular home market model had a missing product characteristic that was not missing in the U.S. model, the particular home market model was not used for price comparison with that particular U.S. model. *Id.*

Plaintiffs argue that the departure from the original model-match methodology resulted in the following practical consequences. If a U.S. sale had missing characteristics, Commerce's program simply *assumed* that the missing characteristics were the same as the characteristics on any potentially matching home market sale, regardless of whether the home market sale had missing characteristics or not. Where a U.S. sale had complete characteristics, however, Commerce *never* matched the sale to a home market product with missing characteristics, even if the home market product was identical in all respects except for the missing characteristics.

Plaintiffs also argue that Commerce's departure from its chosen methodology is not in accordance with law because Commerce did not provide an explanation on the record for its decision. Reliance on Stelco's allegedly unexplained failure to provide the missing data is in plaintiffs' view, an insufficient justification to depart from the chosen methodology. Moreover, even if the departure was explained on the record, an exercise of discretion cannot justify a violation of the statutory mandate. Here, plaintiffs argue that the methodology as applied to excess prime sales with missing product characteristics violates the stat-

ute by allowing Commerce to exclude potentially identical or the next most similar sales based on the assumption that the missing characteristics were the same. Similarly, plaintiffs contend that reliance on the same assumption prevents Commerce from considering appropriate adjustments to similar sales and also adversely affects the constructed value calculation.[10]

The court may uphold a determination by Commerce of "'less than ideal clarity if the agency's path may be reasonably discerned.'" *Outokumpu Copper Rolled Prods. AB v. United States*, 17 CIT 848, 855, 829 F. Supp. 1371, 1378 (1993) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)). The agency's determination, however, must still "'disclose the basis of its order' and * * * must articulate a rational connection between the facts found and the choice made." *Id.* (citation omitted). Commerce did not explicitly articulate the reason for its departure from its original methodology. It did, however, make an implicit decision based on more than Stelco's allegedly unexplained inability to provide the relevant information, that under these circumstances, the methodology used was reasonable.

Commerce's decision that the missing product characteristics were not commercially meaningful for the few sales of excess prime in question and thus not required for the model-match methodology is implied in its position articulated in the *Final Results*. 61 Fed. Reg. at 13,831. Commerce stated:

> [t]he few prime sales Stelco made that did not have complete physical characteristics were orders for which the mill order number had been lost. The Department verified that Stelco designates prime sales lacking complete characteristics as excess prime sales before the product is sold. Stelco then finds customers for this merchandise. Although the material in question is prime, Stelco reported and the Department verified that it is sold at a reduced price, and in the vast majority of cases to distributors. While this merchandise is not defective, full and complete physical characteristics were not needed to make the sale to the customer. The end uses of such material are applications for which knowledge of certain of the product's characteristics was unimportant.
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> * * * * * * *
>
> *Therefore, because Stelco sold this merchandise in both markets, because the missing physical characteristics were not important to Stelco's customers and because we verified that respondent reported all physical characteristics it could, the Department matched this merchandise based on the limited physical characteristics reported.* Since these were the only physical characteristics relevant to the

[10] Plaintiffs also argue that Commerce violated the statute by ceding to Stelco its responsibility of determining which sales were identical or next most similar. *See Timken Co. v. United States*, 10 CIT 86, 98, 630 F. Supp. 1327, 1338 (1986) (Commerce criticized for allowing respondent to report home market sales based upon respondent's determination of such or similar merchandise rather than collecting all home market sales data and making own determination). Specifically, Commerce allegedly ceded its responsibility by altering its methodology based solely on Stelco's unexplained failure to provide complete product information and thus Stelco was able to control the outcome of the model-match exercise. The court finds, however, that by selecting the matching characteristics and requesting the information from Stelco, Commerce controlled the exercise. Moreover, plaintiffs' argument relies upon a finding that Stelco's lack of information was unexplained and intentional. As demonstrated below, this finding has not been made.

> way the product was sold, we conclude that we may make appropriate matches on the basis of only these physical characteristics in this limited circumstance.

Id. at 13,830–31 (emphasis added). While Commerce could have articulated a more precise determination explaining why various characteristics previously ranked by order of importance were no longer important, this generalized determination is sufficient. The facts relied upon by Commerce are clearly articulated and are rationally connected to its choice to proceed with the model-match methodology even without complete product characteristics. Thus, Commerce did not abuse its discretion in departing from the original model-match methodology.

Also relevant to Commerce's decision is the fact that the number of sales with missing characteristics is relatively small. In the home market, Stelco's misreporting affected less than 5%[11] of total home market sales.[12] Stelco's Final Computer Database for Corrosion-Resistant Sales (April 14, 1995), C.R. Doc. 169, Stelco's App., Tab 12; Stelco's Chart, at 1. Moreover, the misreporting affected all characteristics in Commerce's model-match hierarchy for less than .4% of prime merchandise out of the total tons sold. Stelco's Final Computer Database for Corrosion-Resistant Sales, C.R. Doc. 37, Stelco's App., Tab 12; Stelco's Chart, at 1. In the U.S., the misreporting affected .4% of Stelco's total U.S. sales.[13] *Id.* In addition, while Stelco's misreporting affected five different product characteristics, including quality and strength, the fourth and fifth most important characteristics in Commerce's hierarchy, no sale was missing more than three characteristics. *See* Stelco's Final Computer Database (U.S. Observation No. 705), C.R. Doc. 169, Pls.' App., Tab 20.

Moreover, Commerce's chosen methodology as applied to excess prime sales with missing product characteristics is in accordance with law. The generic value assigned to all missing product characteristics does not reflect an assumption that all missing characteristics were the same. The generic value assigned reflects Commerce's implicit decision that in this limited situation, those characteristics were not important to the end user and thus were not needed for the model-match exercise. In addition, plaintiffs have not demonstrated through specific examples how the model-match as applied prevented Commerce from making appropriate adjustments or adversely affected the constructed value calculation.

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[11] Stelco reported [ ] excess prime sales with missing characteristics out of a total of [ ] prime sales. This information is from Stelco's Final Computer Database (Apr. 13, 1995), C.R. Doc. 169, and was summarized in a chart presented by Stelco at oral argument before the court. The parties stipulated to the facts contained in the chart.

[12] Stelco asserts that 90 percent ([ ] out of [ ]) of the home market prime sales without full characteristics were sold at prices less than the cost of production. Thus, Stelco argues that "virtually none of these home market sales would have been used in the dumping calculation even if complete characteristics had been reported, and therefore, these home market sales essentially were irrelevant to the Department's antidumping analysis." Stelco's Response Brief, at 26.

Plaintiffs persuasively demonstrate the flaw in Stelco's logic. Commerce must base foreign market value on constructed value when above-cost sales of such or similar merchandise are inadequate. *See* 19 C.F.R. § 353.51(b)(1994). If as Stelco argues, most of the home market sales with missing characteristics were below cost and thus would require constructed value comparisons, the failure to include these sales in the dumping calculation would make the distortion of the dumping margin greater.

[13] Stelco reported sales with missing product characteristics for [ ] out of [ ] excess prime sales and [ ] out of [ ] prime sales. *See* Stelco's Final Computer Database (Apr. 13, 1995), C.R. Doc. 169, Pls.' App., Tab 20; Stelco's Chart, at 1.

Plaintiffs also argue that Commerce's factual findings in the *Final Results* were not supported by substantial evidence on the record. Substantial evidence has been defined as "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Usinor Sacilor v. United States*, 18 CIT 1155, 1156, 872 F. Supp. 1000, 1003 (1994) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)). Moreover, Commerce's decisions are not constrained by the inferences the parties make from the factual record. *Böwe Passat Reinigungs-Und Wäschereitechnik v. United States*, 951 F. Supp. 231, 235 (Ct. Int'l Trade 1996). Rather, "Commerce may, based on its experience in administering the statute and regulations, make justifiable inferences on the record before it." *Id.; see also Matsushita Elec. Indust. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (reviewing whether "the evidence and reasonable inferences from the record support the [ITA finding].").

Plaintiffs argue that the *Final Results* which included the following statements are unsupported by substantial evidence on the record and are contradicted by Stelco's statements in its questionnaire response regarding excess prime and secondary products: (1) "because of the way Stelco keeps its records * * * it could not report the full physical characteristics"; (2) "Stelco sold this merchandise in both markets"; (3) the sales in question constitute only a small portion of total sales; and (4) full and complete product characteristics were not needed to complete sales of excess prime merchandise. *Final Results*, 61 Fed. Reg. at 13,831.

After reviewing the record, the court finds that Commerce's findings are supported by substantial evidence. First, Commerce's finding that Stelco reported all of the information that it could is supported by Commerce's verification of Stelco's sales. Commerce's verification report, specifically the section on secondary merchandise, noted that "[d]uring the verification, we observed the tracking and recordkeeping that Stelco employs during the steel production process." Sales Verification Report of Stelco (May 2, 1995), at 7, P.R. Doc. 181, Def.'s Conf. App., Ex. 4. Moreover, the record includes multiple references to the importance of the mill order number. *See, e.g.*, Stelco's Section IV Response (Nov. 14, 1994), at 3, P.R. Doc. 116, Stelco's App., Tab 13 ("Stelco can fully identify the product characteristics of a particular sale only through the prime order number."); Stelco's Supplemental Questionnaire Response (Jan. 10, 1995), at 30–32, P.R. Doc. 210, Stelco's App., Tab 14. While these references generally are in the context of discussing secondary merchandise and not excess prime, this evidence when combined with Commerce's verification report, supports a finding that the information was not withheld wrongfully.

Second, the fact that Stelco sold excess prime in both markets is evidenced by the computer database and in the chart presented by Stelco at oral argument. Stelco's Final Computer Database for Corrosion-Resistant Sales, C.R. Doc. 169, Stelco's App., Tab 12; *see also* Stelco's Chart, at

1. Third, the same chart and computer database clearly indicate that only a small portion of Stelco's total sales were reported without full product characteristics. Stelco's Final Computer Database for Corrosion-Resistant Sales, C.R. Doc. 169, Stelco's App., Tab 12; Stelco's Chart, at 1.

Moreover, Commerce's findings that full and complete characteristics were not necessary for the sale of excess prime merchandise is also supported by substantial evidence. The record indicates that "[e]xcess prime merchandise differs from prime merchandise in that it has not been produced pursuant to a given customer's specifications. Rather, it exists in stock and is sold 'as is.'" Stelco's Supplemental Questionnaire Response (Nov. 21, 1994), at 26, P.R. Doc. 137A, Def.'s App., Ex. 4. Excess prime merchandise is generally sold at a reduced price[14] to customer service centers that have the ability to process material and apply it to applications in their own customer base. Stelco's Secondary Material Supplemental Questionnaire Response (Feb. 22, 1995), at 8–9, C.R. Doc. 112, Stelco's App., Tab 16. Thus, excess prime is material "which is not suitable for the original order in terms of size or mechanical properties, but which would still be suitable for another end use." *Id.* at 2. From this evidence, it was reasonable for Commerce to infer that for each individual sale of excess prime merchandise knowledge of all eleven product characteristics was not needed.

Plaintiffs also argue that Stelco's Response to Commerce's Supplemental Questionnaire contradicts most of Commerce's findings.[15] Stelco's response only contradicts Commerce's findings when taken out of context. Stelco's statement is part of a response to Commerce in which Stelco made arguments concerning how Commerce should treat excess prime sales *with* complete characteristics in its model-matching exercise. Thus, Stelco's response does not undercut Commerce's findings of fact that support its conclusion of how to treat excess prime sales *without* complete characteristics.

Thus, plaintiffs' cites to the record do not provide direct contradictions to the facts found by Commerce. At most, they suggest that alternative inferences could have been made from the facts. The court, however, does not function as a finder of fact in this instance and Com-

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[14] Stelco stated on the record that selling excess prime at a reduced price has nothing to do with the physical characteristics of the merchandise. Stelco's Secondary Merchandise Supplemental Response (Feb. 22, 1995), at 3, C.R. Doc. 112, Stelco's App., Tab 16. Plaintiffs argue that Stelco's statement contradicts the factual finding of Commerce. While plaintiffs may be correct that the reduced price is unrelated to the physical characteristics of the merchandise and thus may not provide a sound reason for departing from the original methodology, Commerce did not base its decision to use the available information on this fact alone.

[15] Plaintiffs rely on the following statement in Stelco's response to Commerce's supplemental questionnaire to undercut the factual findings:

> The model-match exercise seeks to compare various *physical characteristics* to determine which home market products are identical or most similar to the U.S. products. The focus and analysis of the model-match exercise is based solely on the physical characteristics. To the extent the customer type and conditions of sale are relevant considerations, they are relevant to circumstances of sale only and not to product classification.
>
> There are no physical differences between merchandise identified as "excess prime" and prime merchandise. Stelco's designation "excess prime" simply means that the particular product was not applied (for whatever reason) to the original order. The fact that merchandise designated "excess prime" is sometimes sold at a lower price than identical prime merchandise has absolutely nothing to do with the physical characteristics of the merchandise. Consequently, no justification exists for making the distinction between excess prime and prime for model-match purposes.

Stelco's Secondary Merchandise Supplemental Response (Feb. 22, 1995), at 3, C.R. Doc. 112, Stelco's App., Tab 16.

merce is allowed to draw inferences that contradict the inferences drawn by the parties. As Commerce's findings were supported by substantial evidence on the record, the court affirm the final results.

Finally, plaintiffs also argue that Commerce failed to follow its statutory mandate of applying a reasonably adverse inference to Stelco's sales when a respondent refuses, without explanation, to report complete product characteristics and accurate difference in merchandise ("difmer") data for every sale. Plaintiffs contend that respondents may have benefitted by Commerce conducting the model-match with the available, yet incomplete, information provided by Stelco. Moreover, plaintiffs argue that the lack of complete product characteristics effected Commerce's ability to determine actual costs and thus, the surrogate of the average cost of production for all products having the same characteristics applied by Stelco was unreasonable.

Commerce responds that application of best information available ("BIA") was not appropriate because the model-match methodology properly matched sales based on the information reported. Moreover, Commerce noted that Stelco could not report full product characteristics for the few sales at issue, but did provide all of the product characteristics that it could. In addition, Commerce noted both Stelco's cooperation and the relatively few number of sales in reaching its determination that BIA was inappropriate.[16]

Section 1677e(c) of Title 19 states that Commerce shall:

> In making their determinations under this subtitle, the administering authority and the Commission shall, whenever a party or any other person *refuses or is unable to produce information* requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available.

19 U.S.C. § 1677e(c) (emphasis added). "It is well established * * * that Commerce has broad discretion with regard to when the use of BIA is appropriate," *Timken Co. v. United States*, 18 CIT 486, 489, 852 F. Supp. 1122, 1125 (1994), and that the court must grant Commerce considerable deference in its choice to apply or not to apply BIA. *Al Tech Specialty Steel Corp. v. United States*, 947 F. Supp. 510, 523 (Ct. Int'l Trade 1996).

The power to use BIA against recalcitrant parties cannot, however, be wielded arbitrarily. *Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565, 1572 (Fed. Cir. 1990). Thus, Commerce may not, as plaintiffs argue, characterize a party's failure to provide information that does not

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[16] Commerce articulated its position as:

> The use of BIA is not appropriate in this case, because Department methodology properly matches sales based on the information Stelco reported. The Department verified that because of the way that Stelco keeps its records Stelco could not report the full physical characteristics of the small number of sales in question. Petitioners' reference to AFB's from France is not precisely relevant, because in that case, the Department used the BIA cited by petitioners as total BIA for companies that either failed to respond to the Department's questionnaire or were unable to complete verification. In this case, Stelco cooperated with the Department and provided all the product matching physical characteristics that it could report. In addition, the Department could use the information that Stelco provided for matching purposes. Consequently, the use of total BIA in this circumstance is unwarranted.

Final Results, 61 Fed. Reg. at 13,831.

exist as a "refusal" to provide data. *Id.* at 1573. Moreover, an incomplete response does not automatically sanction the application of BIA. Commerce may consider both the degree of cooperation by the respondent and the size of the omission in reaching its decision to either apply BIA or accept the available information. *See Al Tech Specialty Steel*, 947 F. Supp. at 523 (affirming application of neutral BIA in form of overall weighted-average calculated margin to account for unreported sales based on minimal omission and substantial compliance by respondent); *Usinor Sacilor v. United States*, 907 F. Supp. 426, 429 (Ct. Int'l Trade 1995) (application of neutral BIA appropriate when respondent substantially complies with request for information and omission arises from factors beyond control).

The facts of this case support Commerce's decision to not apply BIA and to rely instead upon both the slight variation of the original model-match methodology and a surrogate average cost of production for all products having the same characteristics. Commerce verified that Stelco had reported all of the information available. *See Olympic Adhesives*, 899 F.2d at 1573 (failure to provide information that does not exist does not constitute a "refusal" to comply). Notwithstanding Commerce's verification, plaintiffs argue that the information would have been kept in the normal course of business[17] and thus its absence is a result of an intentional refusal to provide information. Plaintiffs, however, have not presented evidence which would undermine Commerce's finding. While it is true that excess prime sales normally would not lose their mill order numbers, the lack of mill order numbers on a few[18] excess prime sales by itself does not demonstrate intentional conduct by Stelco to withhold information. Stelco's Final Computer Database for Corrosion-Resistant Sales, C.R. Doc. 169, Stelco's App., Tab 12; Stelco's Chart, at 1. Rather, it equally supports Commerce's implicit acceptance of Stelco's statement that the missing product characteristics were lost inadvertently as Stelco was able to report the majority of the information requested.

In addition, Stelco cooperated with Commerce throughout the investigation. Plaintiffs argue, however, that with respect to sales of excess prime merchandise, Stelco was not cooperative because it did not notify Commerce of the sales with missing characteristics until its Rebuttal Brief. While it is true that all previous discussions of sales with missing characteristics involved secondary merchandise or non-prime sales, the discussions did put Commerce on notice of the significance of the mill order number. Stelco repeatedly stated that if a sale lost its mill order

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[17] Stelco maintains two sales processing systems: (1) a "mill order" system which is used to both manufacture and sell prime merchandise, and (2) a "stock" order entry system which is used solely to ship and sell merchandise, usually the merchandise that does not meet the specifications for prime merchandise. Stelco's Supplemental Questionnaire Response, at 30–32, P.R. Doc. 210, Stelco's App., Tab 14. Stelco can fully identify the product characteristics of a particular sale only through the prime order number (or mill order number). Stelco's Section IV Response, at 3, P.R. Doc. 116, Stelco's App., Tab 13. Whether the mill order number is retained or not is usually determined by when the steel becomes non-prime. Stelco's Supplemental Questionnaire Response, at 31–32, P.R. Doc. 210, Stelco's App., Tab 14. It remains if the decision to treat the steel as non-prime occurs after the steel has left the production line. *Id.* Generally, because excess prime is never downgraded to non-prime, it would normally retain its mill order number and Stelco would be able to report full product characteristics.

[18] For example, [ ] out of [ ] U.S. excess prime sales were missing their mill order numbers. Stelco's Chart, at 1.

number, it would be unable to provide complete product characteristics for that sale. *See* Stelco's Section IV Response, at 2, P.R. Doc. 116, Stelco's App., Tab 13; Stelco's Supplemental Questionnaire Response, at 30–32, P.R. Doc. 210, Stelco's App., Tab 14. Logically, the same result would occur when an excess prime sale loses its mill order number.

Moreover, it is difficult to understand how such a small omission could have impeded the investigation and justified an application of adverse BIA. For U.S. sales of excess prime, only a few sales were missing product characteristics. *See* Stelco's Chart, at 1. For home market sales, less than .4% by volume were missing information on all eleven characteristics. *See* Stelco's Final Computer Database, C.R. Doc. 169, Pls.' App., Tab 20; Stelco's Chart, at 1. Thus, the size of the omission combined with Stelco's substantial compliance justify Commerce's decision to not apply adverse BIA.[19]

B. *Clerical or Billing Error Adjustments to Price:*

There is no dispute between the parties as to the basic principles applicable to price adjustments in this case. Price adjustments must be transaction specific. *See SKF USA Inc. v. United States*, Slip Op. 95–85, at 16–17, 1995 WL 283855, at *7–8 (Ct. Int'l Trade May 8, 1995); *Antifriction Bearings (Other Than Tapered Roller Bearings), and Parts Thereof from France, et al*, 61 Fed. Reg. 66,472, 66,498 (Dep't Commerce 1996)(final results of admin. review)[hereinafter *"AFB's 1996"]*. Adjustments are sufficiently transaction specific when they are directly attributable to individual sales or when they are made across several transactions but are allocable on a fixed percentage of sales basis or some other constant rate. *SKF USA, Inc.*, Slip Op. 95–85, at 16–17, 1995 WL 283855, at *7–8; *AFB's 1996*, 61 Fed. Reg. at 66,498.[20]

The adjustments at issue are not for widely available discounts, rebates or similar items which may or may not be determinable on a fixed or constant basis across numerous sales. Rather they are for generally variable adjustments for clerical or other billing errors. Such adjustments must be related on the record to specific transactions, either directly or through proper allocation. Presumably because the adjustments were not across the board rebates or discounts they were not placed in a separate computer field, but instead were included within the gross unit price. *See* Antidumping Questionnaire (Sept. 15, 1995), at App. I.B–8 to B–9, I.C–8 to C–10, App. II–2, P.R. Doc. 20; Stelco's App., Tab 3. An indication was given, however, for each sales to which an ad-

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[19] Plaintiffs rely *Gray Portland Cement and Clinker from Mexico*, for the proposition that Commerce must apply an adverse inference where a respondent fails to supply certain information such as complete product characteristics and accurate difmer data. *Final Results of Redetermination Pursuant to Court Remand, Cemex, S.A. v. United States, Slip Op. 95–72 (April 24, 1995), remand determination remanded on other grounds, Cemex, S.A. v. United States*, Slip Op. 96–132 (Aug. 13, 1996). Although Commerce did apply adverse BIA to sales for which respondent did not report difmer data in *Gray Portland Cement*, plaintiffs fail to note that Commerce applied BIA in part because the respondent withheld requested data and presented conflicting evidence concerning the cost differences of products. Here, however, Commerce verified that Stelco was not withholding information and determined that the information available was useable.

[20] The parties quibble as to whether these are recognized departures from the fixed percentage or constant rate principle of allocation in certain fact situations, e.g., when the departures are insignificant, but they do not argue about the general rule.

justment was made, i.e., "C" for credit, "D" for debit or "B" for both. Stelco's Supplemental Questionnaire Response (Jan. 10, 1995), at 46–47, P.R. Doc. 210, Pls.' App., Tab 6; Stelco's Post-Verification Corrections to the Corrosion-Resistant Database (Apr. 13, 1995), at Exs. 1–3, P.R. Doc. 381, Pls.' App., Tab 12. Less than 8% of sales had such notations. *See* Stelco's Final Computer Database, P.R. Doc. 169, Stelco's App., Tab 12.

Where an adjustment references one invoice covering one sale plaintiffs raise no objection. The objection is to adjustments which are related to multiple invoices or to invoices covering several sales. Stelco and plaintiffs agree that Stelco's records *enabled* it to relate adjustments not just to individual invoices but to specific transactions within invoices. They disagree as to whether this relationship was demonstrated to Commerce.

The problem is that Commerce necessarily examined a limited number of sales. It examined just twenty corrosion resistant sales. Sales Verification Report for Stelco (May 2, 1995), at 17–18, P.R. Doc. 403, Stelco's App., Tab 6. Of those, Commerce examined three billing error adjustments that affected a total of five transactions. *See* Sales Trace Verification Ex. 37 (May 2, 1995), C.R. Doc. 37, Stelco's App., Tab 11. Plaintiffs have not demonstrated that any of the three contained unallowable allocations or were not transaction specific. Plaintiffs point to one adjustment for cut-to-length plate steel that was improperly cross referred to sales. *See* Stelco Sales Verification Ex. 37 (May 5, 1995)(Home Market Observation 14220), C.R. Doc. 180, Pls.' App., Tab 21. Apparently, Commerce did not consider the plate adjustment indicative of Stelco's normal methodology with respect to corrosion resistant steel. This conclusion is reasonable. There is no evidence that the plate allocation error represented Stelco's normal practice for billing error adjustments for corrosive resistant steel, which had a separate billing department.[21] *See* Sales Verification Report (May 2, 1995), at 2, C.R. Doc. 181, Def.'s Conf. App., Ex. 4.

While there is some confusion as to whether Commerce found the adjustments directly transaction specific or merely found an acceptable allocation to specific sales, it is clear that Commerce accepted the adjustments. Of the three corrosion adjustments that were verified, two involved multiple invoices, but it appears that the single debit or credit adjustment involved in each was properly related to each referenced invoice. *See* Sales Trace Verification Exhibits (Observation Nos. 642, 1850, & 1860), C.R. Doc. 37, Stelco's App., Tab 11. While Commerce seems to find these examples not transaction specific, the adjustments at least do appear to be proper allocations. When dealing with limited adjustments applicable to a very few invoices the distinction between "directly transaction specific" and "properly allocated" seems to blur.

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[21] Furthermore, the problem encountered in the plate example may not occur with regard to corrosion-resistant steel. The parties agree there were either none or very few single invoices covering multiple transactions. Thus, the plate adjustment fact scenario was unlikely to occur with respect to corrosion-resistant steel.

Finally, it should be noted that 15% of Commerce verified sales samples contained the adjustments at issue. *See* Sales Verification Report for Stelco, at 17–18, P.R. Doc. 403, Stelco's App., Tab 6; Stelco's Sales Verification Exs., Stelco's App., Tab 7. As noted previously, less than 8% of the total contained these adjustments. Thus, the court concludes that Commerce conducted a reasonable investigation with respect to this issue and no error has been demonstrated, other than some less than clear language in the Commerce determination.

III. *Continuous Colour Coat:*

A. *Debit and Credit Adjustments to Prices:*

While the Commerce determination may have been less than clear as to Stelco's adjustments to price, the court was able to discern from the record that the adjustments were proper. This is not the case with CCC's post-invoice debits and credits covering multiple invoices. Commerce is simply wrong in its implicit conclusion that the specificity at issue is the ability of the respondent to identify a particular debit or credit. *See Final Results*, 61 Fed. Reg. at 13,822. Obviously, the specificity required is with respect to *sales transactions* and the ability to relate or properly allocate a debit or credit to such transactions. Otherwise a respondent could apply any debit or credit it could identify to any sale in its entire sales base.

None of the parties have pointed to evidence in the record that makes clear that Commerce either did or did not act correctly in this regard. Defendant states that the adjustments should be upheld because plaintiffs had the burden of demonstrating error. While this may ordinarily be the case, when Commerce so clearly misstates the law, remand is the better option. Commerce shall indicate where in the record the debits and credits noted are shown to be properly related either directly or through allocation to specific sales transactions. If Commerce determines an acceptable level of specificity has been achieved or may otherwise be overlooked because a few such adjustments were made to the "same customer" within a "limited period," *id.*, Commerce shall indicate where this is factually supported in the record and why these facts are relevant.

CONCLUSION

The matter is remanded to Commerce for 45 days to correct ministerial errors in Stelco's margin calculation and for reconsideration of Dofasco's partial reversal of restructuring charges and CCC's error adjustments to price. Objections may be filed 11 days thereafter and any response within 5 days.

PUBLIC VERSION

(Slip Op. 97–153)

MITSUBISHI HEAVY INDUSTRIES, LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND GOSS GRAPHICS, INC., DEFENDANT-INTERVENOR

Consolidated Court No. 96–10–02292

KOENIG & BAUER-ALBERT AG, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND GOSS GRAPHICS, INC., DEFENDANT-INTERVENOR

Consolidated Court No. 96–10–02298

[Final determination on scope and standing affirmed]

(Decided November 19, 1997)

Steptoe & Johnson (Anthony J. LaRocca, Julia Court, and *Richard O. Cunningham)*, Attorneys for Mitsubishi Heavy Industries, Ltd., *Kirkland & Ellis (Kenneth G. Weigel* and *Nancy Kao)*, Attorneys for Koenig & Bauer-Albert AG and KBA-Motter Corp., for Plaintiffs.

Frank W. Hunger, Assistant Attorney General of the United States, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; Of Counsel, *Robert J. Heilferty* and *Boguslawa B. Thoemmes*, Attorneys, Office of the Chief Counsel for Import Administration, Department of Commerce, and *Randi-Sue Rimerman*, Attorney, Department of Justice, Civil Division, Commercial Litigation Branch, for Defendants.

Wiley, Rein & Fielding, (Charles Owen Verrill, Jr., Alan H. Price, and *Willis S. Martyn III)* for Defendant-Intervenors.

OPINION

POGUE, *Judge:* Plaintiffs, Mitsubishi Heavy Industries ("MHI") and Koenig & Bauer-Albert AG and KBA-Motter Corp. (collectively "KBA") move for judgment on the agency record pursuant to USCIT R. 56.2, challenging the United States Department of Commerce's ("Commerce") final antidumping determination. *See Large Newspaper Printing Presses & Components Thereof, Whether Assembled or Unassembled from Japan*, 61 Fed. Reg. 38,139 (Dep't. Commerce 1996) (final deter.) *("Japan Final"); Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled from Germany*, 61 Fed. Reg. 38,166 (Dep't. Commerce 1996) (final deter.) *("Germany Final").* MHI and KBA object to Commerce's final scope determination, contending that it constitutes an impermissible expansion of the scope of the investigation, as defined in Commerce's *Notice of Initiation*.[1]

BACKGROUND

Domestic producer Goss Graphics, Inc.[2] ("Goss") petitioned Commerce to investigate possible sales at less than fair value of "large newspaper printing presses * * * and [five named] press components,

[1] *See Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Germany and Japan*, 60 Fed. Reg. 38,546 (Dep't. Commerce 1995) (notice of initiation).

[2] Goss filed the petition under its former name, Rockwell Graphic Systems, Inc.

whether assembled or unassembled," from Germany and Japan. The petition defined an unassembled press system, addition, or component as "any collection of * * * constituent parts, imported for assembly into a press, press addition, or press component, and whether or not combined, * * * with constituent parts or components from non-subject sources * * *." *See* Antidumping Petition, Public Version (June 30, 1995), Pub. Doc. No. 1, at 6–7.

MHI and other respondents challenged the petition, arguing that petitioner's definition of unassembled presses appeared to include parts or subcomponents of press systems and components and that petitioner had failed to identify the members of the U.S. industry that manufactured those parts or subcomponents. In the *Notice of Initiation*, ITA addressed respondents' arguments:

> [W]e note that the subject merchandise defined in the scope section of this notice clarifies that the domestic like product identified in the petition is limited to large newspaper printing press systems, press additions, and the five named major press system components. The subcomponents and parts identified by MHI are not included in the definition of the domestic like product accepted by the department. As such, there is no issue with respect to domestic producers of printing press subcomponents or parts.

60 Fed. Reg. at 38,546.

The scope definition in the *Notice of Initiation* was based on the petition. However, to further clarify that parts and subcomponents were not included in the scope of the investigation, Commerce deleted petitioner's language referring to "constituent parts" of a component. Thus, Commerce defined the scope to include "complete LNPP's, additions, and the [five named] press components, regardless of degree of disassembly and/or degree of combination with non-subject elements before or after importation." *Id.* at 38,547. The parties disagreed on the meaning of this language and requested additional clarification on the scope of the investigation. *See Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Japan,* 61 Fed. Reg. 8,029, 8,031 (Dep't Commerce 1996) (prelim. determ.) *("Japan Prelim."); Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Germany,* 61 Fed. Reg. 8,035, 8,037 (Dep't Commerce 1996) (prelim. determ.) *("Germany Prelim.").*

In the preliminary determinations, Commerce "clarified the scope to include 'elements' (otherwise referred to as 'parts' or 'subcomponents') of an LNPP system, addition or component, *which taken as a whole, constitute a subject LNPP system, addition or component used to fulfill an LNPP contract.*" *Japan Prelim.*, 61 Fed. Reg. at 8,030; *Germany Prelim.*, 61 Fed. Reg. at 8,036 (emphasis added). Commerce, however, had not defined when a collection of elements "constitutes" an LNPP component and invited comment from the parties. *See Japan Prelim.*, 61 Fed. Reg. at 8,031; *Germany Prelim.*, 61 Fed. Reg. at 8,037. In the final determinations, Commerce defined the scope of its investigation to in-

clude parts when those parts are imported to fulfill a contract for an LNPP system and constitute at least 50 percent of the value of the component into which they are incorporated.[3] *Japan Final* scope comments are contained within *Germany Final*.[4] MHI and KBA object to this definition.

DISCUSSION

I. *Scope and Industry Support:*

An antidumping investigation may be commenced in one of two ways: an interested party may file a petition alleging the elements necessary for imposition of an antidumping duty, 19 U.S.C. § 1673a(b); or Commerce may self-initiate an investigation. 19 U.S.C. § 1673a(a); 19 C.F.R. § 353.11 (1996). To initiate an investigation in response to a petition, Commerce must "determine whether the petition alleges the elements necessary for the imposition of a duty * * *" and "determine if the petition has been filed by or on behalf of the industry," i.e., whether the domestic industry supports the investigation. 19 U.S.C. § 1673a(c)(1)(A).

MHI and KBA argue that Commerce's clarification of the initial scope determination was unlawful under the antidumping statute as amended by the Uruguay Round Agreements Act of 1994 ("URAA").[4] Specifically, plaintiffs argue that Commerce's discretion to change the scope of an investigation is limited by amendments to the statutory provisions governing the determination of industry support.

Before the URAA took affect, Commerce could presume industry support unless a petition was actively opposed. *See NTN Bearing Corp. v. United States*, 15 CIT 75, 79, 757 F. Supp. 1426, 1429 (1991). Now, Commerce may not operate on the basis of the presumption, but rather must establish that:

> (i) the domestic producers or workers who support the petition account for at least 25 percent of the total production of the domestic like product, and
>
> (ii) the domestic producers or workers who support the petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition.

19 U.S.C. §1673a(c)(4)(A) (1994). This determination must be concluded within 20 days of the filing of the petition. 19 U.S.C. § 1673a(c)(1)(A). The URAA also says that "[a]fter [Commerce] makes a determination with respect to initiating an investigation, the deter-

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[3] Commerce defined the scope of its investigation as follows:

> Any of the five components, the use of which is to fulfill a contract for large newspaper printing press systems, press additions, or press components, * * * is included in the scope of this investigation. Also included in the scope are elements of a LNPP system, addition or component, which taken altogether, constitute at least 50 percent of the cost of manufacture of any of the five major LNPP components of which they are a part.

Germany Final, 61 Fed. Reg. at 38,169–70.

[4] Pub. L. No. 103–465, 108 Stat. 4843 (1994).

mination regarding industry support shall not be reconsidered." 19 U.S.C. § 1673a(4)(E) (1994).[5]

MHI and KBA argue that "[t]he definition of the domestic industry is tied to the definition of the domestic like product, which is defined in terms of the subject merchandise." (Mot. of Pls. Mitsubishi Heavy Industries, Ltd., Koenig & Bauer-Albert AG and KBA-Motter Corp. J. Agency Rec. on Scope and Standing Issues (Pls.' Mem.) at 16 n. 61 (citing 19 U.S.C. § 1677(4)(A) (definition of domestic industry); 19 U.S.C. § 1677(10) (definition of domestic like product)). Therefore, "under the new statute ITA must define the scope of the investigation prior to initiation so that it can determine whether the industry making the products included in the scope support the initiation of an investigation." *Id.* at 16. Plaintiffs also argue, "the scope cannot be expanded as the investigation proceeds because industry support for a new scope cannot be considered after initiation." *Id.* Thus, according to plaintiffs, the issue before the Court is Commerce's ability under the URAA to expand the scope of an investigation after initiation. However, the Court need not reach this issue because the Court finds that Commerce did not expand the scope.[6]

In reviewing a final determination, the Court must decide whether Commerce's determination is in accordance with law and whether Commerce's conclusions are supported by substantial evidence on the record. Section 516a(b)(1)(B)(i) of the Tariff Act of 1930, 19 U.S.C. § 1516a(b)(1)(B)(i)(1994).

Certainly if the words of the URAA are to have meaning, they must create a duty to define the domestic like product with enough specificity to conduct a meaningful industry support analysis. Here, the Court finds the steps taken by Commerce were sufficient to define the domestic like product with the requisite degree of specificity and thus to conduct a meaningful industry support analysis. Therefore, Commerce's scope definition was in accordance with its obligations under the URAA.

Commerce based its initial definition of domestic like product on Goss's petition, according to its usual practice. *See Kern-Liebers USA, Inc. v. Unitd States*, 881 F. Supp. 618, 621 (CIT 1995) ("[T]he agency generally exercises [its] 'broad discretion to define and clarify the scope of an antidumping investigation in a manner which reflects the intent of the petition.'") (quoting *Minebea Co. v. United States*, 16 CIT 20, 22, 782 F.Supp. 117, 120 (1992), aff'd on other grounds, 984 F.2d 1178 (Fed.Cir.1993)).

Goss's petition included within the suggested scope of the investigation, LNPP systems, additions and the named components whether assembled or unassembled. *See* Antidumping Petition, Public Version (June 30, 1995), Pub. Doc. No. 1, at 6–7. Commerce met with Goss's legal counsel to discuss the meaning of the term "component" as used in

[5] Prior to the URAA, parties could challenge Commerce's industry support determination late in the investigation. *See Tianjin Mach. Import & Export Corp. v. United States*, 16 CIT 931, 806 F. Supp. 1008 (1992) (permitting respondents to challenge Commerce's industry support determination two weeks before final determination).

[6] This case does not involve the question whether Commerce may contract the scope of an investigation.

the petition. P.R. 15, Ex. 5. Goss then clarified that the term "component" specifically referred to the five components subsequently named in Commerce's preliminary and final determinations.

Commerce's definition of the subject merchandise in the notice of initiation did not finally resolve the issue of when incomplete merchandise—made up of unassembled parts—would constitute a component. Commerce's definition did, however, clearly include unassembled components used to fulfil an LNPP contract and the industry support determination was based on this definition. Because the statute gives Commerce only 20 days to make its industry support determination it would not be reasonable for the Court to demand absolute finality in the definition of unassembled components at such an early stage in the investigation.

Given the time limits imposed on Commerce's initiation decision and the fact that no domestic producer expressed opposition to the petition, the Court finds that the procedures Commerce followed constituted a reasonable application of the statute and therefore, that the scope definition upon which it based its industry support determination was in accordance with law.

In addition, in framing its final scope definition, Commerce responded to concerns that the inclusion of incomplete merchandise would "conflict with the Department's industry support determination," *Germany Final*, 61 Fed. Reg. at 38,168, by taking steps to ensure that elements that did not amount to an LNPP system, component or addition would not be assessed with antidumping duties. These steps included tying the imported elements to LNPP contracts, the provision of certifications,[7] and the exclusion of spare parts. Thus only elements used to produce an LNPP component are within the scope of the investigation.

Plaintiffs have produced no evidence that would indicate that Commerce's clarification expanded the definition of the domestic like product so as to include producers not considered in the industry support determination. In the absence of such evidence, the Court concludes that Commerce's scope clarification was consistent with the statute as amended by the URAA.

II. *Expansion of Scope:*

MHI and KBA also argue that "ITA violated its established practice by expanding the scope of the investigation * * * after the investigation had begun," and that "ITA and the CIT have consistently found that scope expansions made late in an investigation are improper * * *." (Pls.' Mem. at 19). Furthermore, plaintiffs argue, "late scope expansions hinder ITA's ability 'to obtain evidence, to receive comments from parties which may be affected by a revision of the scope of [the] investigation, and to allow the Department sufficient time to consider the issue.'"

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[7] Under the Department's certification procedure, German and Japanese producers/exporters and U.S. importers in the LNPP industry are given the opportunity to certify that imported elements will not be used to fulfill an LNPP contract. (Final Scope Mem. at 17, July 15, 1996 (P.R. 505)).

(Pls.' Mem. at 21 (quoting *Personal Word Processors from Japan*, 56 Fed. Reg. 31,303, 31,104 (Dep't. Commerce 1991) (final deter.)).

"Commerce retains broad discretion to define and clarify the scope of an antidumping investigation in a manner which reflects the intent of the petition." *Minebea Co. v. United States*, 16 CIT 20, 22; 782 F. Supp. 117, 120 (1992) (upholding as supported by substantial evidence scope clarification made after notice of initiation). This discretion is limited by the requirement that it be exercised reasonably and that any consequent determination be supported by substantial evidence in the administrative record. *See Minebea*, 16 CIT at 22; 782 F. Supp. at 119. Commerce's discretion also is limited by concerns for finality of administrative action. *See Smith Corona v. United States*, 16 CIT 562, in midstream to include items which were clearly known about and excluded at the time of initiation of the investigation * * *.").

As the Court explained above, the scope definition articulated in both the petition and Commerce's *Notice of Initiation*—and used in the industry support analysis—included LNPP systems, additions, and five components. In the Preliminary Determination, Commerce left open only the question of when an assembly of parts became equivalent to an LNPP component. Commerce explained its decision to include a collection of elements that represented something less than one hundred percent of the parts of an LNPP system, component or addition, as follows:

> [I]t was the Department's intent to use the language at issue to avoid creating loopholes for circumvention, including those arising from differing degrees of completeness of the imported merchandise. The Department is concerned that, because of the great number of parts involved, there is the potential that a party may attempt to exclude its merchandise from the scope of these investigations on the basis of a lack of completion.

Germany Final, 61 Fed. Reg. at 38,169.

According to *Mitsubishi Elec. Corp. v. United States*, 12 CIT 1025, 1042, 700 F. Supp. 538, 552 (1988), "[T]he ITA has a certain amount of discretion to expand the language of a petition to encompass the literal intent of the petition, * * * with the purpose in mind of preventing the intentional evasion or circumvention of the antidumping duty law." *aff'd*, 898 F. 2d 1577 (Fed. Cir. 1990).

Furthermore, although the petition did not specifically refer to incomplete LNPPs, additions and components, Commerce's language reflects the intent of the petition and *Notice of Initiation* which covered "[a]ny of the five components, or collection of components, the use of which is to fulfill a contract for large newspaper printing press systems, press additions, or press components, regardless of degree of disassembly, and/or degree of combination with non-subject elements before or after importation * * *." 60 Fed. Reg. 38,547.

In making its clarification, Commerce tied the subject merchandise to a contract for the sale of an LNPP system, addition or component thus ensuring that elements that did not amount to an LNPP system or com-

ponent would not be assessed with antidumping duties. Commerce's scope clarification represents a reasonable attempt by Commerce to balance respondents' concerns for finality and the fairness of Commerce's investigation, with the statutory duty to issue an effective and administrable antidumping duty order. *See Mitsubishi*, 12 CIT at 1046–47, 700 F. Supp. at 555–56 (1988).

Plaintiffs argue that in *Bicycles from the People's Republic of China*, 61 Fed. Reg. 19,026, 19,027 (Dep't. Commerce 1996)(final determ.) Commerce defined unassembled to mean fully or partially unassembled, and incomplete to mean lacking one or more parts or components. Because the *Bicycles from China* case defined "unassembled" and "incomplete" as separate concepts, plaintiffs contend, the definitions are mutually exclusive. Thus, plaintiffs conclude, Commerce cannot now define an *unassembled* component to include a group of parts that constitute something less than a complete component (i.e., an incomplete component). (Tr. Aug. 20, 1997 Hr'g. at 55–56). However, in *Professional Electric Cutting Tools from Japan*, 62 Fed. Reg. 386, 387 (Dep't. Commerce 1997)(final results admin. review), Commerce defined unassembled to include "components which, when taken as a whole, * * * can be converted into the finished or unfinished or incomplete tool * * *." Because Commerce has not consistently interpreted the two terms as being mutually exclusive, the Court cannot accept respondents' argument. Consequently, Commerce's inclusion of incomplete merchandise within the scope of its investigation represents a permissible interpretation of the language in the *Notice of Initiation*.

III. *The 50-percent Value Test:*

Plaintiffs also object to Commerce's 50-percent value test arguing that neither the antidumping statute nor the regulations "provide ITA with authority to define 50 percent of a product as the equivalent of the finished product." (Pls.' Mem. at 24).[8] Furthermore, plaintiffs argue, "[i]n the customs area it is well established that an incomplete or unfinished article can be classified the same as the complete article only if it has the 'essential character' of the complete article." (Pls.' Mem. at 25 (citing General Rule of Interpretation 2(a) of the Harmonized Tariff Schedule of the United States (1997)).

The antidumping statute defines subject merchandise as "the class or kind of merchandise that is within the scope of an investigation, a re-

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[8] Plaintiffs also argue that Commerce's 50-percent test violates the antidumping statute because the importer cannot determine at the time of entry whether imported LNPP parts are within the scope of Commerce's antidumping duty order. (Pls.' Mem. at 27). The Court does not agree. Commerce's scope definition includes LNPP systems, five named components and additions. Commerce's decision to define LNPP systems, components and additions to include parts constituting at least 50 percent of the value of the component into which they are incorporated was a permissible exercise of Commerce's discretion. There is nothing in the statute that requires a conclusive scope determination at the time of importation.

Plaintiffs' contention that Commerce's 50 percent test is inconsistent with the GATT panel decision in the Swedish anti-dumping duties case is similarly unconvincing. In that case, the Italian government complained about Sweden's imposition of dumping duties on nylon stockings. Specifically, the Italian government objected to the Swedish government's practice of imposing dumping duties on producers who were selling below a certain price without first conducting an investigation to see whether the producers were actually dumping. *See Swedish Anti-Dumping Duties*, Feb. 23, 1955, GATT B.I.S.D., (3d Supp.) at 81. In this case, Commerce's dumping determination was made after a full investigation. Thus, the Swedish anti-dumping case is inapposite.

view, a suspension agreement, an order * * * or a finding under the Antidumping Act, 1921." 19 U.S.C. § 1677(25). The statute does not specify when a collection of parts rises to the level of subject merchandise. "If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984). Here, Commerce was choosing between two tests, an essence test[9] and a value test. Commerce chose the value test because given the complexity of the subject merchandise, and the large number of parts involved, it was not possible for Commerce "to reduce the 'essence' definition to a single, non-contradictory definition." *Germany Final* at 38,169. The complexity of the subject merchandise and large number of parts involved are well documented. Thus, Commerce's rejection of the essence test in favor of the value test is supported by substantial evidence.

Having decided to include incomplete components within the scope of its investigation, and having rejected the essence test in favor of a value test, Commerce was obliged to choose a number to make its order administrable. The nature of this choice made a certain degree of randomness unavoidable. It is difficult, for example, to distinguish between 50 percent and 49 percent, or between 50 percent and 51 percent. This difficulty was exacerbated by the complexity of the subject merchandise as well as the large number of parts involved.

In order to make its choice, Commerce did exactly what an agency is required to do, "reason its way to a decision without pretending that that decision reflected some degree of rational perfection * * *." *See Fishermen's Dock Coop. Inc. v. Brown*, 75 F.3d 164, 173 (4th Cir. 1996). "Where the agency's line-drawing does not appear irrational and the [plaintiff] has not shown that the consequences of the line-drawing are in any respect dire * * * we will leave that line-drawing to the agency's discretion." *Leather Industries v. Environmental Protection Agency*, 40 F.3d 392, 409 (D.C. Cir. 1994).

Commerce has offered a rational explanation for choosing the value test over the essence test, describing the value test as "consistent, predictable, and administrable," and for setting the threshold at 50 percent. *See Germany Final*, 61 Fed. Reg. at 38,169. Specifically, Commerce concluded that this threshold would assure that the combination of parts was significant enough to "capture" elements critical to the component. *Id.* at 38,170. Plaintiffs have failed to produce evidence to show any dire consequences of Commerce's choice. Therefore, the Court finds that Commerce's 50-percent value test constitutes a reasonable method

[9] Use of the essence test would require authorities to consider, on a case-by-case basis, whether imported parts or subcomponents when taken together are "essentially a LNPP system, addition or component." *Germany Final*, 61 Fed. Reg. at 38,168. "The essence approach * * * seeks, in principle, to capture what a particular subject LNPP component actually is—*i.e.* the 'heart' of it." *Id.* at 38,169.

for defining the point at which a collection of parts constitute the equivalent of a component.[10]

IV. *ITA'S Suspension of Liquidation Instructions:*

Respondents' contention that Commerce's suspension of liquidation instructions are invalid is equally without merit. Plaintiffs argue that ITA's suspension of liquidation instructions will suspend liquidation of both subject and non-subject merchandise. "The antidumping statute * * * authorizes suspension of liquidation only of 'merchandise subject to the determination' and the posting of a cash deposit, bond, or other security only for entries of 'subject merchandise.' Accordingly, entries of *nonsubject* merchandise cannot have their liquidation suspended by the order." (Pls.' Mem. at 33).

However, as the Court said above, there is nothing in the statute that requires a conclusive scope determination at the time of importation. *See* n. 8. Furthermore, by suspending liquidation only of parts that are tied to an LNPP contract, and providing the opportunity to certify that parts are not tied to an LNPP contract, Commerce took reasonable steps to prevent the suspension of liquidation of nonsubject merchandise. Thus Commerce's suspension of liquidation instructions were in accordance with law.

CONCLUSION

Commerce's scope clarification was in accordance with law, supported by substantial evidence, and does not raise concerns about finality of administrative action. For these reasons, Commerce's decision to include within the scope of its investigation, elements of an LNPP system, addition, or component, which taken together, constitute at least 50 percent of the cost of manufacture of any of the five major LNPP components of which they are a part is sustained.

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[10] Goss argues that Commerce should have included in its investigation, a sale by Man Roland of a lower folder to the [ ]. (Goss Graphic Systems, Inc. Mot. J. Agency Rec. at 1). KBA and Man Roland argue that the [ ] sale was outside the scope of the investigation. A folder is one of the five named press components included within the scope of the investigation. In the final scope determination, a folder is defined as "a module *or combination of modules* capable of cutting, folding and/or delivering the paper from a roll or rolls of newspaper broadsheet paper more than two pages in width into a newspaper format." *Germany Final* at 38,167 (emphasis added). Thus, a folder may consist of a single subcomponent or "module" or several modules, depending on the design of the specific LNPP.

Goss interprets the definition of a folder to mean that a single module may be considered to be a folder even if the folder in the particular press system is comprised of several modules. Although it does not say so explicitly, Commerce interprets the scope language to mean that a single module may be considered a folder only if that module comprises 50 percent or more of the cost of manufacturing the entire folder. The Court finds Commerce's interpretation of the scope language to be consistent with the 50-percent value test and with Commerce's goal of excluding non-subject parts and subcomponents from the scope of this investigation. Therefore, the Court will defer to Commerce's interpretation. *See Minebea*, 16 CIT at 22; 782 F. Supp. at 119.

Commerce's decision to exclude the [ ] sale also was supported by substantial evidence. The [ ] press system folder comprised four types of modules: a lower folder, delivery system, lower former, and upper (balloon) former. Commerce investigators found that the value of the lower folder purchased from Man Roland was less than 50 percent of the value of the entire folder. The record contains ample documentation to support this finding. *See* Commerce Mem. of July 15, 1996, re: Constructed Value, Further Manufacturing and Constructed Export Price Adjustments for Final Determination, Worksheet 7.

Because Commerce's decision to exclude the [ ] sale was reasonable and supported by substantial evidence, the decision is sustained.

(Slip Op. 97–154)

NSK LTD. AND NSK CORP., KOYO SEIKO CO., LTD., KOYO CORP. OF U.S.A., NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING CORP., NTN CORP., NTN DRIVESHAFT, INC., NTN BOWER CORP., NIPPON PILLOW BLOCK SALES CO., AND FYH BEARING UNITS USA, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO. AND AMERICAN HONDA MOTOR CO., INC., DEFENDANT-INTERVENORS

Consolidated Court No. 95–03–00239

(Dated November 20, 1997)

ORDER

TSOUCALAS, *Senior Judge:* Upon consideration of The Torrington Company's ("Torrington") Motion to Amend Slip Op. 97–74, and NSK Ltd. and NSK Corporation's ("NSK") Motion for Partial Reconsideration of Slip Op. 97–74, and all other papers and proceedings thereto, it is hereby

ORDERED that Torrington's motion is granted; and it is further

ORDERED that item 8 of the second paragraph on page three to Slip Op. 97–74 be revised to read:

> "exclude NTN's sample and other similar transfers for which there was no consideration from NTN's home market database.";

and it is further

ORDERED that the last sentence of the second paragraph of item 7 on page thirty-five to Slip Op. 97–74 be revised to read:

> "Consequently, the Court concludes that Commerce improperly included sample and other similar transfers for which there was no consideration in NTN's home market database and remands to Commerce to exclude them from the FMV calculation.";

and it is further

ORDERED that item 8 of the Conclusion on page seventy-five to Slip Op. 97–74 be revised to read:

> "exclude NTN's sample and other similar transfers for which there was no consideration from NTN's home market database.";

and it is further

ORDERED that the eighth ordering paragraph of this Court's Order to Slip Op. 97–74 be revised to read:

> "**ORDERED** that Commerce is to exclude NTN's sample and other similar transfers for which there was no consideration from NTN's home market sales database; and it is further";

and it is further

ORDERED that NSK's motion is denied.

NOTE: Pursuant to the court's Procedures for Publication of Opinions and Orders, the court's unpublished order entered on October 24, 1997 is being published by the Clerk's Office as Slip Op. 97–155 on November 20, 1997.

(Slip Op. 97–155)

F.LLI DE CECCO DI FILIPPO FARA SAN MARTINO S.P.A., ET AL., PLAINTIFFS, AND ASSOCIATION OF FOOD INDUSTRIES PASTA GROUP AND BARILLA ALIMENTARE S.P.A., PLAINTIFF-INTERVENORS *v.* UNITED STATES, DEFENDANT, AMD BORDEN, INC., HERSHEY FOODS, CORP., AND GOOCH FOOD, INC., DEFENDANT-INTERVENORS

Consolidated Court No. 96–08–01930

(Dated October 23, 1997)

ORDER

RESTANI, *Judge:* Upon the motions of plaintiffs F.lli de Cecco di Filippo Fara San Martino S.p.A., Rummo S.p.A. Molina e Pastificio, La Molisana Industrie Alimentari S.p.A., and Pastificio Fratelli Pagani S.p.A., and plaintiffs-intervenors Barilla Alimentari S.p.A., the AFI Pasta Group, and Industria Alimentari Colavita S.p.A., for judgment under USCIT R. 56.2, to annul an extension by the United States Department of Commerce ("Department") of provisional antidumping measures for the period of May 19, 1996 through July 24, 1996, and for other relief, and upon the papers presented in support of such motions, and the Court having considered the opposition to such motions, and having heard the arguments of counsel, and the Court having issued its opinion and order dated October 2, 1997, granting plaintiffs' motions, and for the reasons stated therein, it is hereby

ORDERED, ADJUDGED AND DECREED that plaintiffs' motions for judgment are granted; and it is further

ORDERED, ADJUDGED AND DECREED that the Department shall instruct the United States Customs Service ("Customs Service") to : (1) lift the suspension of liquidation, release any bonds or other security posted, and refund any and all cash deposits paid as estimated antidumping duties on any and all entries of the subject merchandise which were produced by a producer listed on Exhibit A, attached hereto, or imported by an importer listed on Exhibit A, and were entered, or withdrawn from warehouse for consumption, after May 18, 1996, and before July 24, 1996; and (2) liquidate those entries without regard to any antidumping duty; and (3) pay any such refunds of cash deposits in accordance with law, including interest, from the date of entry at the rate(s) as announced from time to time by the Customs Service pursuant to Title 19, United States Code, Section 1505(c).

The Clerk of the Court is directed to enter judgment accordingly.

EXHIBIT A TO JUDGMENT

Producers:

F.lli de Cecco di Filippo Fara San Martino S.p.A.
Rummo S.p.A. Molina e Pastificio
La Molisana Industrie Alimentari S.p.A.
Pastificio Fratelli Pagani S.p.A.
Barilla Alimentari S.p.A.
Industria Alimentari Colavita S.p.A.

Importers:

Agrusa, Inc.
Belcanto Fancy Foods, Ltd.
Cento Fine Foods, Inc. (Atlantic Food Distributors)
George De Lallo Co., Inc.
Domil, Inc.
Ferrara Food Co., Inc.
Gourmet Award Foods
I.T. & M, Inc.
Italfoods, Inc.
La Pace Imports, Inc.
Medusa Corporation
Musco Food Corp.
The Pastene Companies, Ltd.
Rienzi & Sons
Ron-Son Mushroom Products, Inc.
Santini Foods, Inc.
Sinco, Inc.
World Finer Foods, Inc.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C97/76 11/13/97 Pogue, J.	R.G. Barry Corp.	94-10-00633	9802.00.80 Without allowance for value of ribbon used to form bows	9802.00.80 With allowance for value of ribbon used to form bows and accordance of duty-free status	Agreed statement of facts	Laredo Ladies footwear, style no. EL419 and EL420 having decorative bows attached
C97/77 11/14/97 Goldberg, J.	Marubeni America Corp.	96-6-01562	7407.10.15 Not stated	7411.10.10 1.5%	Agreed statement of facts	Los Angeles Copper tubes

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